

LIBRARY
SUPREME COURT, U.S.

Volume I
TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1918

No. 22

WALTER H. PILLSBURY AND ALBERT FOTE, DEPUTY
COMMISSIONERS OF THE THIRTEENTH CEMENT
DISTRICT, ETC., PETITIONERS

UNITED ENGINEERING COMPANY, A CORPORATION
RESPONDENTS, INSURANCE COMPANY, ETC.

APPEAL FROM THE DISTRICT COURT OF
APPEALS FOR THE NINTH CIRCUIT

RECEIVED FOR THE SUPREME COURT, OCTOBER 15, 1918
RECEIVED FOR THE SUPREME COURT, OCTOBER 15, 1918

INDEX

Record from U. S. D. C. for the Northern District of California, Southern Division:	Page
Complaint for injunction	2
Motion to dismiss	12
Opinion, Goodman, J.	15
Order and decree	22
Notice of appeal	23
Transcript of testimony at hearing	24
Testimony of Howard Johnson	27
Exhibit "A"—Copy of excerpt from report of Dr. H. D. Berlin	33
Exhibit "B"—Copy of excerpt from report of Dr. W. F. Holcomb	33
Exhibit "C"—Copy of excerpt from report of Dr. H. D. Berlin	35
Clerk's Certificate	36
Proceedings in U. S. C. A. for the Ninth Circuit:	
Statement of points to be relied upon and designation of parts of record to be printed	38
Motion for consolidation for briefing and argument	40
Order of consolidation	41
Order of submission	43
Order directing filing of opinion and filing and recording of judgments	43
Opinion, Healy J.	44
Judgment	48
Clerk's certificate	48
Order extending time to file petition for writ of certiorari	51
Order allowing certiorari	53

No. 12644

**United States
Court of Appeals**
for the Ninth Circuit.

WARREN H. PILLSBURY, Deputy Commissioner for the Thirteenth Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act,

Appellant,

vs.

UNITED ENGINEERING COMPANY, a Corporation, and **FIREMAN'S FUND INSURANCE COMPANY**, a Corporation,

Appellees.

Transcript of Record

**Appeal from the United States District Court
Northern District of California,
Southern Division.**

NAMES AND ADDRESSES OF ATTORNEYS

FRANK J. HENNESSY,

United States Attorney.

EDGAR R. BONSALE,

Assistant United States Attorney,

Post Office Building,

San Francisco, California.

Attorneys for Defendant

and Appellant.

JOHN H. BLACK,

EDWARD R. KAY,

233 Sansome Street,

San Francisco, California.

Attorneys for Plaintiffs and Appellees.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 28735G

UNITED ENGINEERING COMPANY, a Corpo-
ration,

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Plaintiffs,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner for the Thirteenth Compensation Dis-
trict, Under the Longshoremen's and Harbor
Workers' Compensation Act,

Defendant.

COMPLAINT FOR INJUNCTION PURSUANT
TO TITLE 33, U.S.C.A., SECTION 921

To the Honorable District Court of the United
States, Northern District of California, South-
ern Division:

The plaintiffs, United Engineering Company, a
corporation, and Fireman's Fund Insurance Com-
pany, a corporation, respectfully show:

I.

Plaintiff, United Engineering Company, at all
times herein mentioned has been and now is a corpo-
ration; Plaintiff Fireman's Fund Insurance Com-
pany, at all times herein mentioned has been and

now is a corporation. Both of said corporations have their principal offices in the City and County of San Francisco, State of California.

II.

That plaintiff Fireman's Fund Insurance Company, a corporation, at all times herein mentioned, was the Longshoremen's and Harbor Workers' Compensation insurance carrier for said United Engineering Company, a corporation.

III.

On the 12th day of May, 1947, one, Howard Johnson, was in the employ of the said United Engineering Company as a longshoreman and on said date was working as such longshoreman aboard the Steamer Monterey on navigable waters of the United States at Alameda, California.

IV.

On said date and at said place, the said Howard Johnson suffered an injury to his back and neck, while employed as longshoreman by said United Engineering Company.

V.

That thereafter on May 14, 1947, plaintiffs herein provided medical treatment to the said Howard Johnson for the said injuries.

VI.

That the plaintiff United Engineering Company duly filed with defendant a report covering said injuries in accordance with Section 30 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 930.

VII.

That no compensation payments were ever made to the said Howard Johnson or promised by said plaintiffs, or either of them.

VIII.

That on the 17th day of January, 1949, a claim for compensation was filed with the defendant Deputy Commissioner by the said Howard Johnson, alleging that the said injury of May 12, 1947, first caused disability on August 12, 1948.

IX.

On March 17, 1949, defendant made and entered a compensation order awarding compensation payment to the said Howard Johnson, as follows:

Federal Security Agency, Bureau of Employees'
Compensation, 13th Compensation District
Compensation Order Award of Compensation
Case No. 1366-1134, Claim No. 3178

In the matter of:

The claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

HOWARD JOHNSON,

Claimant,

against

UNITED ENGINEERING COMPANY,

Employer.

FIREMAN'S FUND INSURANCE COMPANY,

Insurance Company.

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

Findings of Fact

That on the 12th day of May, 1947, the claimant above named was in the employ of the employer above named at San Francisco Harbor, in the State of California, in the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Fireman's Fund Insurance Company; that on said day claimant herein, while performing service for the employer as a welder leaderman, and engaged in ship repair work on a completed vessel on navigable

waters of the United States, sustained personal injury arising out of and in the course of his employment with the employer herein and resulting in disability as follows: While going up a ladder he bumped his head and neck on a cross-beam, sustaining extensive strain of the muscles of the neck which still continue painful; that defendants pleaded at the first hearing that the claim was barred by the period of limitations prescribed by said Act; that the claim was filed on January 17, 1949; that Employer's First Report of Injury was filed on May 28th, 1947; that the employer continued claimant in lighter work in a partially disabled condition without reduction in wages because of such physical impairment until it disposed of its ship-repair plant on May 15, 1948; that by reason of such provision of lighter work claimant did not lose time from work as a result of his injury until about June 15, 1948; that defendants have furnished claimant with medical treatment throughout; that no cause of action accrued in favor of claimant under the Longshoremen's and Harbor Workers' Compensation Act until the completion of one week's disability from labor after June 15, 1948, and that therefore the claim for compensation is not barred by said period of limitations; that the average weekly earnings of the claimant herein at the time of his injury amounted to the sum of \$72.80; that by reason of said injury claimant has been temporarily and partially disabled from labor from June 15, 1948, to January 31, 1949, less two weeks in which he secured employment at odd jobs;

that he was to return to work on January 31, 1949, the day of the hearing, but that the nature and duration of said work and wages therefore have not yet been placed in evidence; that claimant's disability during said period was temporary and partial and amounted to loss of 50% of his earning capacity by reason of his inability to perform various parts of his regular work and consequent loss of employment opportunities otherwise open to him; that he did no work during said period, and that he is entitled to compensation therefor at the rate of \$24.13 a week for 32-6/7ths weeks amounting to \$792.84, no part of which has been paid; that from and after January 31st, 1949, he will be partially disabled from labor and that such disability is fixed at a minimum extent until further information is submitted as to his current wage earning capacity; that he is therefore entitled to compensation at \$8.00 a week, payable in installments each two weeks until a change in the extent of his wage earning capacity or the further order of the Deputy Commissioner; that claimant's attorneys, Smith & Parrish, have rendered legal service to claimant in the prosecution of his claim at the reasonable value of \$50.00 and are entitled to lien therefore upon compensation herein awarded;

Upon the foregoing facts the Deputy Commissioner makes the following:

Award

That the employer, United Engineering Company, and the insurance carrier, Fireman's Fund Insur-

ance Company shall pay to the claimant compensation as follows:

The sum of \$792.84 forthwith as of January 31, 1949, less however, the sum of \$50.00 to be deducted therefrom and paid to claimant's attorneys, Smith & Parrish upon their lien for attorney's fees; to claimant the further sum of \$8.00 a week, payable in installments each two weeks beginning February 1, 1949, until the further order of the Deputy Commissioner.

Given under my hand at San Francisco, California, this 17th day of March, 1949.

WARREN H. PILLSBURY,
Deputy Commissioner,
13th Compensation Dist.

Every payment awarded under a Compensation Order earns 20% additional if not paid within 10 days from the date it becomes due.

X.

That the evidence in the hearing before the said defendant is without conflict that the said Howard Johnson sustained injury on the 12th day of May, 1947, that he received medical treatments therefor and that no compensation payments were made or promised to the said Howard Johnson by the plaintiffs, or either of them.

XI.

That no claim for compensation was filed with the Deputy Commissioner by or on behalf of the

said Howard Johnson until more than one year after the injury of May 12, 1947, to wit: January 17, 1949.

XII.

That prior to the first hearing on said claim, plaintiffs pleaded that said claim was barred by the period of limitations prescribed by the said Longshoremen's and Harbor Workers' Compensation Act.

XIII.

That by the said Compensation Order of March 17, 1949, the plaintiffs herein are ordered to pay \$792.84 in one lump sum to said Howard Johnson, as of January 31, 1949, less the sum of \$50.00 to be deducted and paid to the said Howard Johnson's attorneys, and that the plaintiffs are further required to pay to the said Howard Johnson the sum of \$8.00 per week beginning February 1, 1949, until further order of the said defendant Deputy Commissioner.

XIV.

Plaintiffs are informed and believe, and upon such information and belief, allege that the said Howard Johnson, claimant in the said proceedings before the defendant Deputy Commissioner, to whom compensation payments are ordered to be paid as aforesaid, is a person of no financial means and without property, and if plaintiffs should pay to him the sums awarded in said Compensation Order, they could not be recovered back and that accordingly plaintiffs will suffer great and irreparable

damage and injury if said award and order is not stayed.

XV.

The said claim for compensation was not filed with the Deputy Commissioner until January 17, 1949, although the Deputy Commissioner found that claimant was disabled from June 15, 1948. The claim was, therefore, not filed until over seven months after the date that disability is alleged to have begun. The defendant's award, therefore, has placed plaintiffs in the position of being required to pay accrued compensation in the amount of \$792.84 together with additional compensation at the rate of \$8.00 per week thereafter.

XVI.

Plaintiffs are informed and believe that an early date for a hearing on the merits of this matter can be had before this Honorable Court.

XVII.

Plaintiffs believe that there is a great probability that the said Compensation Order of the defendant will be set aside by this Court on the ground that said defendant had no jurisdiction to issue such Order in view of the uncontradicted evidence that the said claim was filed more than one year after the date of said injury.

Wherefore, plaintiffs pray that said Compensation Order and Award be set aside and the same and its enforcement be permanently enjoined and restrained; that in addition said compensation order may be suspended and that an order be entered for

an interlocutory injunction suspending the same during the pendency of this action; that payments required by said order and award and each of them be stayed until final decision herein; and that this Court may find and adjudge that the said claim for compensation was filed more than one year after the said injury and that, therefore, the said Howard Johnson's right to compensation under the provisions of the Longshoremen's and Harbor Workers' Compensation Act is barred; and that plaintiffs should not be, nor is either of them subject to or liable to pay compensation because of the said injury to the said Howard Johnson; and that said claim is not within the jurisdiction or power of defendant to administer or apply as against either plaintiff; and for such other and further relief as to the Court may seem just.

/s/ JOHN H. BLACK,

/s/ EDW. R. KAY,

Attorneys for Plaintiffs, United Engineering Company and Fireman's Fund Insurance Company.

United States of America,

Northern District of California,

City and County of San Francisco—ss.

Geo. Jordan, being first duly sworn, deposes and says:

That he is one of the officers, to wit, Vice President of the Fireman's Fund Insurance Company, a corporation, one of the plaintiffs herein; that he has

read the foregoing Complaint for Injunction Pursuant to Title 33, USCA Section 921, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters set forth therein upon information and belief, and as to these matters he believes it to be true.

/s/ GEO. JORDAN.

Subscribed and sworn to before me this 25th day of March, 1949.

[Seal] /s/ NORMA L. MACHUGH,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires January 15, 1952.

[Endorsed]: Filed March 25, 1949.

[Title of District Court and Cause.]

MOTION TO DISMISS

Now comes the defendant, Warren H. Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission, by his attorney, Frank J. Hennessy, United States Attorney, and Edgar R. Bonsall, Assistant United States Attorney, for the Northern District of California, and moves this Court to dismiss the Bill of Complaint after review of the Compensation Order filed herein, for the following reasons:

(1) That the Bill of Complaint filed herein does

not state a cause of action, and does not entitle plaintiff to any relief, nor does the said Bill of Complaint state a cause of action against the defendant, Warren H. Pillsbury, Deputy Commissioner, upon which relief can be granted.

(2) That it appears from the Bill of Complaint including the transcripts of testimony taken before the Deputy Commissioner that the compensation order filed by him on March 17, 1949, complained of in the Bill of Complaint, was supported by evidence, and under the law said findings of fact should be regarded as final and conclusive.

(3) That it appears from the Bill of Complaint, including said transcripts of testimony, that said Compensation Order complained of herein is in all respects in accordance with law.

(4) For such other good and sufficient reasons as may be shown.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ EDGAR R. BONSALE,
Assistant United States Attorney, Attorneys for
Defendant, Warren H. Pillsbury

This motion will be based on the complaint and pleadings now on file in this matter and the certified copy of the transcript of the proceedings in the case before Deputy Commissioner Warren H. Pillsbury now filed in this court.

[Endorsed]: Filed October 14, 1949.

In the United States District Court for the North-
ern District of California, Southern Division

No. 28735

UNITED ENGINEERING COMPANY, a Cor-
poration, et al.,

Plaintiff,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner, etc.

Defendant.

Appearances:

JOHN H. BLACK,
EDWARD R. KAY,

233 Sansome Street,
San Francisco, California,

Attorneys for Plaintiffs.

FRANK J. HENNESSY,

United States Attorney.

EDGAR R. BONSALL,

Assistant United States Attorney.

MACKLIN FLEMING,

Assistant United States Attorney,
San Francisco, California.

Attorneys for Defendants.

OPINION

Goodman, District Judge.

In these four consolidated actions, the plaintiff employers and their respective insurance carriers have asked this court to set aside and enjoin the enforcement of Compensation Orders and Awards made by the Deputy Commissioner pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 USC 901-950. The question presented is whether the Deputy Commissioner lacked jurisdiction to make the awards because the claims for compensation were not filed within a year after the claimants were injured as is allegedly required by Section 13(a) of the Act. The Deputy Commissioner has moved to dismiss the complaints on the ground that the claims were timely filed and that therefore the awards were proper.

Section 13(a) of the Act provides that "The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made, without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred." (Emphasis added.)

For a proper understanding of the issues presented, a brief account of the injuries suffered by

the claimants and the events leading up to the compensation awards is here necessary.

Claimant Howard Johnson on May 12, 1947, struck his head on a cross-beam of the vessel Monterey while working as a leaderman welder. The muscles of his neck were severely strained and he was unable to continue to weld aboard ship. His employer transferred him to lighter work in the machine shop at no reduction in wages. Although his neck continued to trouble him, he continued to work regularly for more than a year until he was discharged by the new owner of the ship yards because he was unable to weld aboard ship. Since that time he has been employed only intermittently because he is physically able to perform only the less strenuous types of welding operations. When Johnson first lost time from work, he was told it was too late for him to file a claim for compensation. But when he discovered how many employment opportunities were lost because of his condition, he decided to attempt to secure compensation. On January 31, 1949, more than a year and a half after the accident, he filed his claim with the Deputy Commissioner.

Claimant Frank Curnutt on February 17, 1947, while employed as a sheetmetal worker aboard the S. S. Lurline, wrenched his back when he lifted a pre-heater from the deck to a table. He did not work for several days. When he returned to his job, he was relieved of all heavy work on doctor's orders. With some discomfort, he performed lighter duties at his former wage rate until his job ended

in about a year. After resting for two weeks to give his back a chance to heal, he obtained work with the Bethlehem Steel Company. In June of 1948, he quit work for five weeks, as a therapeutic measure suggested by his physician. In July he went to work for a sheet-metal company, but soon was forced to give up this job, and subsequent ones, because the work proved too strenuous. On January 17, 1949, nearly two years after injuring his back, Curnutt filed his claim for compensation.

Claimant Louis Shallat on November 21, 1947, while working as a stevedore aboard the S. S. Mauna Lei, caught his hands between a sling and a bight. Considerable pain and swelling in his hands resulted. According to Shallat, his left hand has pained him continuously since it was injured and he has applied self-treatment. While he testified at the hearing before the Deputy Commissioner that the injury grew "more and more severe," he also stated that "the left hand is still the same as it was when I got injured." Shallat had lost no time from work up to the date of the final hearing before the Deputy Commissioner. At that hearing, Shallat stated that he did not file his claim for compensation until May 23, 1949, nearly a year and a half after he was injured, because he thought the injury "wasn't so serious," and that "it would work its way out."

Claimant Chris Manos was welding on the deck of the tanker Purisima on December 22, 1947, when he was struck on the head by an iron saddle falling from above. He was instructed by the examining

physician not to weld thereafter and consequently was given lighter work by his employer. He suffered no reduction in rating or wages. About two months later his employment terminated as a result of a general reduction in the number of men employed at the ship yard. In a week or so he obtained a shop welding job at a slightly higher wage than he had previously received at the ship yard. This job ended in January of 1949, due to a general lay off. At the time of the hearing before Deputy Commissioner on August 29, 1949, Manos was still unemployed, but was planning to engage in sales work. Manos' neck has troubled him continually since he was struck on the head and he has received regular medical treatment. In some respects the condition of his neck apparently gradually has improved and in others it has grown worse. Manos filed a claim for compensation on August 17, 1949, more than a year and a half after he was injured.

The Deputy Commissioner justified his awards to these claimants and now grounds his motion to dismiss these complaints on his conclusion that Section 13(a) of the Compensation Act sets the one-year period of limitation running, not from the date of injury, but from the date on which the injury became compensable. There may be merit to this interpretation of Section 13(a) but these causes can be determined without reaching the question.

In my opinion, the Deputy Commissioner erred in assuming that the injuries suffered by these claimants were not compensable so long as they con-

tinued to work with no reduction in wages. It is now settled law in this Circuit that a claimant is not precluded from recovering compensation under the Act because he has been paid his old wages at all times since resuming work after being injured. *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 103 F.2d 513 (1939). Accord, *Luckenbach S. S. Co. v. Norton*, 96 F.2d 764 (3 Cir. 1938); *Hartford Accident and Indemnity Co. v. Hoage*, 85 F. 2d 420 (App. D. C. 1936). The Act says nothing about "compensable injuries" but only provides that compensation must be paid for disability. Disability is defined by Section 2(10) as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." The statute makes earning capacity the test. Earning capacity may be properly defined to mean ability to earn, rather than wages actually received. And this means ability to earn in the open labor market, not ability to secure exceptional consideration from a sympathetic employer.

Although their employers did not reduce their wages, claimants Johnson, Curnutt, and Manos were physically unable, following their injuries, to perform the same duties they had previously performed. Pain and suffering were continuous. They were well aware that unless there was improvement in their physical condition, they would be unable to again engage in strenuous activity. Claimant Manos admitted that he was told by the physician, who examined him following his injury, that he could obtain compensation. Instead of doing so, at the same physician's suggestion, he sought and ob-

tained from his employer lighter work at his former wages.

Claimant Shallat apparently continued to perform the same duties following his injury as he had before. But, if his statements to examining physicians are accepted as true, he was in constant pain. The Compensation Act does not deny relief to an injured workman until his pain exceeds endurance.

All four of the present claimants have been disabled within the meaning of the Longshoremen's and Harbor Workers' Compensation Act since the day they were injured. Consequently they had compensable claims.¹ Such claims were not timely filed. It follows that the awards of the Deputy Commissioner were not within his power to make. The court is aware of the well established rule that the Deputy Commissioner's findings of fact should not be disturbed if there is any substantial evidence to support them. But his conclusion that these claimants suffered no disability until long after they were injured is based on an error of law. The undisputed factual record shows that the earning capacity of these men was impaired from the time of injury.

The delay in the filing of these claims is wholly understandable. None of these claimants appear to have been fully aware of his rights and obligations under the Compensation Act. And, even had these men realized the consequences of delay, it is only natural that they should hesitate to jeopardize their

¹See *Liberty Mutual Insurance Co. v. Parker*, 19 F. Supp. 686 (Md. 1937) in which the same conclusion was reached on somewhat similar facts.

opportunity to continue working at their former wage rate by pressing claims for compensation. In a relatively short time the wages of these claimants would have equaled the maximum awards they could ever hope to receive. These, however, are considerations for the lawmakers and not for the Courts.

The motions to dismiss are denied and the awards are severally set aside and vacated.²

Dated May 10, 1950.

[Endorsed]: Filed May 11, 1950.

²The above order in fact fits the issues raised by the pleadings. But in order to technically comply with the rule announced by our Court of Appeals in *Twin Harbor Stevedoring & Tug Co. v. Marshall*, supra, the causes are transferred to the Admiralty docket, the motions will be treated as exceptions and are overruled and a decree will enter vacating and setting aside the awards.

In the United States District Court for the Northern District of California, Southern Division

No. 28735—Civil

UNITED ENGINEERING COMPANY, a Corporation, et al.,

Plaintiffs,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, etc.,

Defendant.

ORDER AND DECREE

In the above-entitled case the motion to dismiss is denied and the award is severally set aside and vacated.

It is further ordered that the above-entitled case is transferred to the Admiralty docket, the motion will be treated as exception and is overruled and a decree is hereby entered vacating and setting aside the award.

Dated at San Francisco, California, this 11th day of May, 1950.

/s/ **LOUIS E. GOODMAN**,

United States District Judge.

(As amended by order of August 23, 1950.)

[Endorsed]: Filed May 11, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, defendant in the above-entitled action, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final order of this Court filed on May 11, 1950, denying the motion of the defendant to dismiss the complaint and vacating and setting aside the order of the defendant awarding compensation dated March 17, 1949.

Dated: July 3, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ EDGAR R. BONSALE,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed July 3, 1950.

United States Federal Security Agency
Bureau of Employees Compensation

Before Warren H. Pillsbury, Deputy Commissioner
13th Compensation District

Case No. 1366-1134

Claim No. 3178

HOWARD JOHNSON,

Claimant,

vs.

UNITED ENGINEERING CO.,

Employer,

FIREMAN'S FUND INSURANCE CO.,

Insurance Carrier.

TRANSCRIPT OF TESTIMONY AT HEARING
JANUARY 21, 1949.

Pursuant to notice, this matter was heard before Warren H. Pillsbury, Deputy Commissioner, Bureau of Employees Compensation, at the coroner's court, at 480 Fourth Street, Oakland, California, on Monday, the 31st day of January, 1949, at 11 a.m.

Appearances:

Claimant present in person and represented by
Joseph E. Smith, attorney.

Defendants represented by B. W. Greenough,
claims superintendent.

Mr. Pillsbury: Claimant states that he is represented by Joseph E. Smith, attorney-at-law, who has been detained. After waiting a considerable time, I informed the parties that I will make up the formal parts of the record while we are waiting for him.

The claim is for sprain and contusion of the neck due to injury of May 12, 1947. The employer filed a first report of injury on May 28, 1947, stating that the injury did not cause loss of time. Nothing further was heard until I received Mr. Smith's letter of December 28, 1948, asking for conference in Oakland. Informal conference was held on January 10, 1949, which did not adjust the matter in view of the position taken by defendants to be repeated in a few moments. No compensation has been paid. Claim was filed following said conference on January 17, 1949, and now comes on for hearing.

Mr. Greenough, what is defendant's position?

Mr. Greenough: We raise the issues of nature and extent of disability, liability for compensation and medical expense, and we will plead that the claim is barred by the statute of limitations.

Mr. Pillsbury: I have the following medical reports in my file which are exhibited for introduction in evidence:

Report of Dr. H. D. Berlin, of August 3, 1948, received as Exhibit "A";

Report of Dr. W. F. Holcomb, of August 12, 1947, Exhibit "B";

Report of Dr. H. D. Berlin, of August 3, 1948, on another form, Exhibit "C."

Does either side have any further medical reports?

Mr. Greenough: I have none.

Mr. Pillsbury: We will suspend until the arrival of Mr. Smith.

(Reconvened upon arrival of Mr. Smith.)

Mr. Pillsbury:

The Following Facts Are Agreed to by the Parties:

1. That claimant Howard Johnson was in the employ of defendant United Engineering Company at Alameda, California, on and about May 12, 1947, as a welder leaderman, and at said time said employer had secured the payments of compensation under the Longshoremen's and Harbor Workers' Compensation Act by insurance in Fireman's Fund Insurance Company;

2. That claimant was injured on said date, said injury occurring in the course of and arising out of his employment and consisting in his sustaining a strained condition of the neck;

3. That at said time claimant was performing ship repair service on the S. S. "Monterey," a vessel on navigable waters of the United States, and the claim is within the provisions of said act;

4. That claimant's average earnings at said time were over \$37.50 a week;

5. That no compensation has been paid.

The Issues Are:

1. Whether the claim is barred by the period of limitations prescribed by said Act;

2. Nature and extent of disability;

3. Whether claimant is entitled to further medi-

cal treatment.

It Is Further Stipulated that claimant has not been to any expense for medical treatment to date.

Mr. Pillsbury: Any other issues, Mr. Greenough?

Mr. Greenough: No, none.

Mr. Pillsbury: With reference to the defense of limitations, the record may show that I have in my file the employer's first report of injury which shows no loss of time from work and which was received in my office May 28, 1947. The claim for compensation was filed on January 17, 1949.

HOWARD JOHNSON

claimant, having been first duly sworn, testified as follows:

By Mr. Pillsbury:

Q. What is your full name?

A. Howard Johnson.

Q. You live at 572-C Buena Vista, Alameda, California?

A. Yes.

Q. You were hurt on May 12, 1947, on the "Monterey"?

A. I think. I am not very good on remembering dates.

Q. What happened to you?

A. I was taking a welder there below in the engine room to show him the job. There were some beams across and I hit my head and neck.

Q. You bumped your head while you were going up a ladder?

(Testimony of Howard Johnson.)

A. Yes, right across there (indicating).

Q. Have you lost any time from work on account of this injury?

A. Well, I think I have.

Q. When did you first lose time from work?

A. As soon as Todd Pacific took over.

Q. When was that?

A. That was I think February—no, March 15 I think they took over.

Q. 1948? A. Yes.

Q. Up to that time you had not lost any time from work? A. No.

Q. What happened commencing March 15, 1948, with reference to your condition and loss of time?

A. In the reduction of work over there I was first lowered from leaderman to welder and I was told by Dr. Dixon and Dr. Holcomb, both, not to use a heavy—

Q. Were your wages reduced?

A. Yes, they were reduced to \$1.75.

Q. Why was that, if you know?

A. I was a leaderman and that pays more money than regular welder.

Q. Why were you reduced, if you know?

A. I guess they had laid off so many men they didn't need me as leaderman any longer.

Q. How much longer did you continue to work after that?

A. They put me to work in the machine shop as acetylene welder and I got along very nicely there.

(Testimony of Howard Johnson.)

When Todd Pacific took over they got a new foreman and he insisted that I should go out to the boats and work under the boats, and I told him I couldn't. So they laid me off.

Q. When was that?

A. I don't know the exact date I was laid off.

Mr. Pillsbury: Have you any information, Mr. Greenough?

Mr. Greenough. I think I can correct the record in regard to the time Todd Pacific took over, May 15.

Mr. Pillsbury: Have you anything further beyond that, Mr. Greenough?

Mr. Greenough: I am sure I have the date he was transferred.

Mr. Pillsbury: That was 1948, was it?

Mr. Greenough: Yes.

Q. (By Mr. Pillsbury): What has been the condition of your neck since May, 1948?

A. Well, right now it is aching. It bothers me to sit still.

Q. Can you do the full work of a welder?

A. No. Acetylene welding like in a machine shop is not too much work. You have rest periods.

Q. What have you been doing since you laid off?

A. I took on a job at Emdee's Sheet Metal Works and I worked there three days and I could not stand it. I stayed there three days and then I went from there I went to Iola Equipment Company. I worked there two and a half days and that is about all.

(Testimony of Howard Johnson.)

Q. What did you make an hour on those two jobs?

A. At the time the raise hadn't gone through. I worked \$1.62 at Emdee's and for the same over there, and I took one more job after that, a guard job. I worked a week. A fellow was on a vacation or someone was sick.

Q. How much did you make on that, how much a day? A. I got \$55.00 for seven days work.

Q. What were your wages at the time you got hurt? A. \$1.82.

Q. An hour? A. Yes.

Q. For how many hours a week?

A. Forty.

Q. And you have done no other work up to now?

A. No.

Q. You have a job now, have you?

A. I started this morning. Jim was going back to work for Todd Pacific and he notified me last week my job was there for me.

Q. You are going back to work?

A. I told him I would take off two hours. I thought I would take off to twelve.

Q. How much do you make on this job?

A. \$1.75.

Q. What kind of a job is it?

A. Just acetylene welding in a machine shop.

Q. Why haven't you done more work since last May?

A. My neck wouldn't permit me to weld.

Q. Why did you lose so much time in making

(Testimony of Howard Johnson.)

claim for compensation?

A. At the time I thought it pretty wise to keep moving and the foreman gave me a job in the acetylene shop I could handle, and I didn't do anything until I was laid off, and I went to see Greenough and then he said it was too late, could not get anything.

Q. Why did you wait so long after that to do anything on your case?

A. He said there was nothing I could do. It was over a year—the fellow in his place.

Q. Then, how did you start getting started on your case?

A. I started to get hungry there looking for something, so I told the Union Hall, so Joe Lobree suggested that I go to Mr. Smith and see what could be done about it.

Mr. Pillsbury: Mr. Smith, any questions?

Q. (By Mr. Smith): Since your injury you are only able to do certain types of welding work?

A. That is right.

Q. Is that the reason you haven't been able to be fully employed? A. That is the reason.

Q. (By Mr. Greenough): You say you were reduced immediately after Todds took over the yard?

A. I lost my job. I probably worked there a month after Todd took over, and I and the foreman could not get along. He wanted to send me out on boats and I told him I couldn't.

Q. They let you off at that time? A. Yes.

(Testimony of Howard Johnson.)

Q. What was your condition at that time?

A. Dr. Dixon told me he could put my neck in a cast.

Mr. Greenough: I just want to ask you what your condition was at that time.

Q. (By Mr. Pillsbury): What is your condition now?

A. It is the same. It just don't change.

Q. (By Mr. Greenough): You first came to my office in August?

A. I don't know just when. I was over there two times and both times you were off.

Mr. Greenough: No further questions.

Mr. Pillsbury: Hearing closed.

Mr. Smith: Attorney's fee requested.

REPORTER'S CERTIFICATE

I hereby certify that the foregoing is a correct transcript of the testimony and proceedings taken in the above matter at the hearing held on the 31st day of January, 1949.

/s/ L. P. SMITH,
Reporter.




EXHIBIT "A"

Copy of excerpt from report of Dr. H. D. Berlin, August 3, 1948:

"4. Date of accident or first illness? May, 1947.

"5. Dates of treatment rendered by you? 8/2/48.

"6. Other treatments, by whom? Doctors Lum, Jones, Holcomb and Dickson.

"7. Nature of treatment by you? Examination—report.

"8. What further treatment indicated?

"9. Who engaged your services?

"10. Was injured person hospitalized? Yes.

"11. State in patient's own words, how accident occurred or occupational disease was caused: As he was going up a ladder he hit his head on a beam, injuring his neck.

"12. Give an accurate and complete description of the nature and extent of injury (please fill in diagram on back): Unable to sleep, neck stiff in morning until he limbers up, has been taking daily physiotherapy at plant.

"18. On what date do you think the injured person will be able to resume his usual work? Working.

"/s/ H. D. BERLIN, M. D."

EXHIBIT "B"

Copy of excerpt from report of Dr. W. F. Holcomb, August 12, 1947:

"Mr. Howard H. Johnson, age 33, welder, living at 572 C Buena Vista Avenue, Alameda, California, was examined by me first on July 30, 1947.

"History: According to his statement he was injured approximately three months ago, while he was at work as a leaderman for the United Engineering Company. He stated that he was running out of the fire room and bumped his head on a beam. He was knocked down with considerable force, although, the fall was somewhat broken by a welder who was behind him. He went to the first aid station where heat treatments were given and reported to the office of Dr. Donald Lum a few days later. X-ray pictures were taken at the Alameda Hospital, which did not show any evidence of fracture or dislocation. He was advised that he had a neuritis and that he should continue his ordinary occupation as best he could.

"Present Complaints: His present complaints are that he cannot sleep; that he has pain that extends from the base of his neck into his head and into the top of the shoulder blade on the left side. He states that his present occupation of welding above his head increases and aggravates the discomfort.

"X-Ray Pictures: X-ray pictures have not been examined but are reported by phone to be negative.

"Diagnosis: Sprain involving the cervical dorsal junction.

"Comment: I believe that this man sprained his neck at the base and probably has a minor amount of neuritis extending into the suprascapular areas. I believe that the simplest type of treatment would be to put him on a job which does not require

extensive use of his neck and allow nature to heal the sprain without interference. He has been treated by a novocain injection with some success and I believe that this might be repeated if his complaints continue. It may be possible that if the irritative symptoms exist for an extended period, that some immobilization will be necessary, such as a plaster collar or other support. I am of the opinion, however, that if his work is so altered that he does not require prolonged and repeated hyperextension of his cervical spine that he probably will get well without a great deal of treatment.

“/s/ W. F. HOLCOMB, M.D.”—

EXHIBIT “C”

Copy of excerpt from report of Dr. H. D. Berlin, August 3, 1948:

“—Impression: Our impression is that this man suffered an injury to his head causing pain in his cervical vertebra, but due to lack of more specific findings, it would seem that he has some arthritic conditions of the cervical vertebrae that were aggravated by the injury.

“Comment: As long as he can get the type of work he can do he gets along all right, but it would appear that if he cannot get the work he is able to do he should change his line. He was advised as to treatment at home.

“/s/ H. D. BERLIN, M.D.”

[Endorsed]: Filed February 10, 1949.

[Title of District Court and Cause.]

**CERTIFICATE OF CLERK TO RECORD
ON APPEAL**

I, C. W. Galbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Complaint for Injunction Pursuant to Title 33,
U.S.C.A. Section 921.

Motion to Dismiss.

Opinion.

Order and Decree.

Notice of Appeal.

Statement of Points on Which Appellant Intends
to Rely and Designation of Parts of the Record
for the Consideration Thereof.

Deputy Commissioner's Certification of Pleadings,
Transcript of Testimony, Exhibits (A, B and C)
and Decision.

In Witness Whereof, I have hereunto set my hand
and affixed the seal of said District Court this 10th
day of August, A.D. 1950.

C. W. CALBREATH,
Clerk.

[Seal]: /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12644. United States Court of Appeals for the Ninth Circuit. Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, Appellant, vs. United Engineering Company, a Corporation, and Fireman's Fund Insurance Company, a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division. Filed August 9, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for
the Ninth Circuit

No. 12644

WARREN H. PILLSBURY, Deputy Commis-
sioner, etc.,

Appellant,

vs.

UNITED ENGINEERING COMPANY, a Corpo-
ration, et al.,

Respondents.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY AND DES-
IGNATION OF PARTS OF THE RECORD
NECESSARY FOR THE CONSIDERA-
TION THEREOF

Appellant states that he intends to rely upon the
following points on appeal:

1. That the District Court erred in failing to
give finality to findings of fact of the deputy com-
missioner supported by evidence.
2. That the District Court erred in reevaluating
the evidence before the deputy commissioner, and
in making different fact conclusions from those
found by the deputy commissioner.
3. That the District Court misconstrued the law
as to when the time for filing claim for compensa-
tion begins to run.

4. That the District Court erred in denying the motion to dismiss the complaint, and in setting aside the compensation order complained of.

5. Appellant designates the following parts of the Record as necessary for consideration of the above points.

1. Complaint.

2. Defendant's motion to dismiss complaint.

3. Opinion-order of the United States District Court dated May 10, 1950, and filed on May 11, 1950, and order and decree dated May 11, 1950, denying the motion of defendant to dismiss the complaint and vacating and setting aside the order of the defendant awarding compensation.

4. The transcript of testimony taken at the hearing before the deputy commissioner on January 31, 1949, together with the exhibits which were copied into said transcript at the end thereof.

5. Notice of appeal.

6. This notice.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ MACKLIN FLEMING,
Assistant U. S. Attorney.
Attorneys for Appellant.

[Endorsed]: Filed August 18, 1950.

[Title of Court of Appeals and Cause.]

**MOTION FOR CONSOLIDATION FOR
BRIEFING AND ARGUMENT**

In the above-entitled causes, appellant hereby moves for the consolidation thereof for purposes of briefing and argument in this court, the grounds for the motion being the existence of a common question of law pertinent to each of these causes, and a common opinion of the District Court covering the common point of law herein.

Dated August 28, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ MACKLIN FLEMING,
Assistant U. S. Attorney.
Attorneys for Appellant.

We join in the above motion.

Dated Aug. 28, 1950.

/s/ JOHN H. BLACK,

/s/ EDWARD R. KAY,

Attorneys for Appellees.

In the United States Court of Appeals for
the Ninth Circuit.

ORDER OF CONSOLIDATION

The above-entitled causes are hereby consolidated
for purposes of briefing and argument in this court.

Dated Aug. 28, 1950.

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ CLIFTON MATHEWS,
Circuit Judge.

/s/ WM. E. ORR,
Circuit Judge.

[Endorsed]: Filed August 30, 1950.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12644

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIR-
TEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S
AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION AND FIREMAN'S
FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

Appeal from the United States District Court for the Northern
District of California, Southern Division

PROCEEDINGS HAD IN THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT.

Excerpt from Proceedings of Wednesday, February 21, 1951

Before HEALY, BONE and ORR, *Circuit Judges*.

ORDER OF SUBMISSION

Ordered appeals herein argued by Mr. Reynold Colvin, Assistant
United States Attorney, counsel for appellants, and by Mr. Ed Kay,
counsel for appellees, and submitted to the court for consideration
and decision.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT.

Excerpt from Proceedings of Wednesday, March 14, 1951

Before HEALY, BONE and ORR, *Circuit Judges*.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING
OF JUDGMENTS

ORDERED that the typewritten opinion this day rendered by this
court in above causes be forthwith filed by the clerk, and that a
judgment be filed in each cause and recorded in the minutes of this
court in accordance with the opinion rendered.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12,644

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

No. 12,645

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

No. 12,646

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

MATSON TERMINALS, INC., A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

No. 12,647

Mar. 14, 1951

ALBERT J. CYR, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

Appeals from the United States District Court, Northern District of California, Southern Division

Before HEALY, BONE, and ORR, *Circuit Judges*.

HEALY, *Circuit Judge*.

Involved here are consolidated cases, four in number, arising under the Longshoremen's and Harbor Workers' Compensation

Act, 33 USCA §§ 901 et seq. In each case the Deputy Commissioner found a partial disability growing out of injury suffered in the course of employment. In one instance (the Shallat case) the award was for permanent and in the others for temporary disability. On appropriate proceedings before the district court the awards were annulled on the ground that the claims were barred because not filed within one year after the injury as provided in § 13(a) of the Act, 92 F. Supp. 898. The Deputy Commissioner appeals.

In each case the claimant suffered a specific injury from accident on a particular date. No latent injury or occupational disease is involved. There were no voluntary payments of compensation. The claims were filed on dates ranging from 18 to 23 months after the injury. Omitting for the moment what we regard as irrelevant or argumentative matters, the Deputy Commissioner's findings were these:

No. 12,644. Claimant Johnson on May 12, 1947, struck his head on a crossbeam of a vessel while working as a welder, "sustaining extensive strain of the muscles of the neck which still continues painful." His employer continued him in lighter work in a partially disabled condition without reduction in wages until May 15, 1948. He lost no time from work as a result of the injury until about June 15, 1948. Throughout the period in question he was furnished by his employer with medical treatment. His claim for compensation was filed January 17, 1949.

No. 12,645. Claimant Curnutt, on the 18th of February, 1947, while performing services as a sheet-metal worker in ship repair operations sustained personal injury resulting in disability as follows: While lifting a heavy object, he wrenched his back. He was disabled from work for six days, after which he was continued in lighter work at full wages until his employment was terminated January 13, 1948. He did not lose wages in excess of seven days until February 5, 1948. His claim for compensation was filed January 17, 1949. Medical treatment was furnished him by the employer throughout the period.

No. 12,646. Claimant Shallat on November 21, 1947, while performing services as a longshoreman on a vessel sustained personal injury resulting in disability as follows: He caught his left hand between a sling and a bight, causing a contusion of the left hand, and exacerbation of a pre-existing progressive arthritis of the proximal joint of the second or middle finger. Apparently he lost no time because of the injury and continued at work. It does not appear from the findings whether he received medical treatment at the expense of his employer. His claim for compensation was filed May 23, 1949.

No. 12,647. Claimant Manos on December 22, 1947, while performing services as a welder in the repair of a ship, sustained personal injury resulting in disability when he was struck on top of the head by an iron bar falling from above, suffering strain of the musculature in the cervical region. Following the injury he continued at his regular occupation as a welder without loss of time or wages until January 31, 1949, at which time, because of the condition of his neck, he was forced to discontinue working as a welder and seek other and lighter employment. Throughout the employer furnished him with medical treatment. His claim for compensation was filed August 17, 1949.

The material portion of § 13(a) of the Act reads: "The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, . . . except that if payment of compensation has been made without an award on account of such injury . . . a claim may be filed within one year after the date of the last payment . . ."

The Commissioner argues that the word "injury" should be construed as meaning "compensable injury." This, he says, has been the practical administrative construction of the term for a long time. He says that the interpretation is "consistent" with § 19(a), providing that a claim for compensation "may be filed . . . at any time after the first seven days of disability," and with § 6(a) providing that "no compensation shall be allowed for the first seven days of the disability . . ." He adds that unless the interpretation meets with judicial approval his office will be flooded with a load of unnecessary claims.

We may observe in passing that the injured men appear to have suffered a disability of greater or less extent from the outset. Two of them, at least, as the Commissioner found, had to be put on lighter work, and all of them confessedly continued from the time of injury to suffer pain and discomfort from it. It is true they lost no time, or none in excess of seven days anyway, and were paid their old wage, but those facts alone do not spell absence of disability for which an award may be made. See *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 9 Cir., 103 F. 2d 513, where this court sustained an award under like circumstances, saying that wages received by a worker who has suffered an injury are not conclusive and that ability to earn is the test.

But we do not, as the trial court did, rest decision on the *Twin Harbor* holding. What the Commissioner's argument really amounts to is that the statute begins to run, not from the date of the injury, but from the date of disability. The view appears irreconcilable with the plain terms of the Act. The argument necessarily assumes that the terms "injury" and "disability" are interchangeable. However, as we pointed out in *Kobilkin v. Pills-*

bury, 103 F. 2d 667, 669, the terms are separately defined in the statute and are not synonymous. Section 2(2) states that when used in the Act "the term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, . . ." In the same section (subdivision 10) "disability" is defined as meaning "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment."

In the *Kobilkin* case, *supra*, the claimant was disabled from work for a period of three weeks following his injury, for the allowable portion of which time compensation was voluntarily paid him. He then resumed his employment at the former wage and continued to work for 17 months, when his condition worsened and it was learned that his injury was more extensive than had originally been thought. Later he filed a claim. Deputy Commissioner Pillsbury disallowed it because not filed within one year from the last payment of compensation as provided in § 13(a). We upheld the ruling and the Supreme Court affirmed without opinion, 309 U.S. 619.¹ Answering an argument somewhat analogous to the one made here, we said that the injury "was inflicted at the time of the accident, not when its full extent was first noted at the later time."

The Commissioner endeavors to distinguish the holding on the ground that *Kobilkin* was off work for more than seven days in consequence of the injury and was appropriately paid compensation. If the distinction were accepted as of controlling significance a startling result would ensue, as will be seen from the following illustration: Worker A is disabled from work for eight days following his injury, and is accordingly paid compensation for the eighth day. If he fails to file a claim within a year after the payment he is forever barred. Worker B is disabled from work for but six days or less after injury, and in line with § 6(a), *supra*, is paid no compensation. According to the argument there is no time limit within which B may file a claim.

As the language of § 13(a) evidences, Congress was not unaware that there would be many cases like B's and it deliberately provided that the right to compensation in such cases would be-

¹ The *Kobilkin* case, unlike the present, may be thought to have involved a latent or undiscovered injury. It is arguable that in such cases the injury should be treated as arising when its true nature is discovered. Possibly this circumstance accounts for the four to four division among the justices when the case was disposed of in the Supreme Court.

come barred unless claim therefor is filed within one year after the injury. If it is thought desirable in the interest of justice or practical administration that a different limitation be prescribed, the power to effect the change resides in Congress, not in the courts.

The decrees of the district court in the several cases are affirmed.

(Endorsed:) Opinion. Filed Mar. 14, 1951. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12644

WARREN H. PILLSBURY, ETC., APPELLANT

vs.

UNITED ENGINEERING COMPANY, ET AL., APPELLEES

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

(Endorsed:) Filed and entered March 14, 1951. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

WARREN H. PILLSBURY, ETC., APPELLANT

vs.

UNITED ENGINEERING COMPANY, ET AL., APPELLEES

Certificate of Clerk, U. S. Court of Appeals for the Ninth Circuit, To Record Certified under Rule 38 of the Revised Rules of the Supreme Court of the United States.

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing forty-nine (49) pages, numbered from and including 1 to and including 49, to

be a full, true and correct copy of the entire record of the above-entitled case in the said Court of Appeals, made pursuant to request of Hon. Philip B. Perlman, Solicitor General of the United States, counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 4th day of June, 1951. [SEAL.]

(S.) PAUL P. O'BRIEN,
Clerk.

In the Supreme Court of the United States

No. — October Term, 1951

WARREN H. PILLSBURY, DEPUTY COMMISSIONER, PETITIONER

vs.

UNITED ENGINEERING COMPANY, ET AL. (HOWARD JOHNSON
INJURY)

WARREN H. PILLSBURY, DEPUTY COMMISSIONER, PETITIONER

vs.

UNITED ENGINEERING COMPANY; ET AL. (FRANK S. CURNETT
INJURY)

WARREN H. PILLSBURY, DEPUTY COMMISSIONER, PETITIONER

vs.

MATSON TERMINALS, INC., ET AL. (LOUIS SHALLAT INJURY)

ALBERT J. CYR, DEPUTY COMMISSIONER, PETITIONER

vs.

UNITED ENGINEERING COMPANY, ET AL. (CHRIS MANOS INJURY)

Upon consideration of the application of counsel for the petitioners,

It is ordered that the time for filing petition for certiorari in the above-entitled causes be, and the same is hereby, extended to and including 11th day of August 1951.

HUGO L. BLACK,
*Associate Justice of the Supreme
Court of the United States.*

Supreme Court of the United States

No. 229, October Term, 1951

[Title omitted.]

Order allowing certiorari

Filed October 15, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below, which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.

Volume II
TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 229

**WARREN H. PILLSBURY AND ALBERT J. CYR, DEPUTY
COMMISSIONERS FOR THE THIRTEENTH COMPEN-
SATION DISTRICT, ETC., PETITIONERS**

vs.

**UNITED ENGINEERING COMPANY, A CORPORATION
FIREMEN'S FUND INSURANCE COMPANY, ET AL**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

**PETITION FOR CERTIORARI FILED AUGUST 7, 1951
CERTIORARI GRANTED OCTOBER 15, 1951**

INDEX

Record from U. S. D. C. for the Northern District of California, Southern Division:	Page
Complaint for injunction	2
Motion to dismiss	12
Opinion, Goodman, J.	15
Order and decree	22
Notice of appeal	23
Transcript of testimony at hearing	24
Testimony of James A. Gaughran	28
Ella Bettencourt	30
Frank S. Curnutt	32
Exhibit "A" Copy of excerpt from report of Dr. Donald D. Lum	52
Exhibit "B"—Copy of excerpt from report of Dr. V. C. Stehr	54
Exhibit "C"—Copy of report of Dr. V. C. Stehr	56
Exhibit "D"—Copy of report of Dr. Paul L. Jones	57
Exhibit "E"—Copy of excerpt of report of Dr. V. C. Stehr	58
Exhibit "E" Copy of excerpt of report of Dr. Geo. J. McChesney	58
Exhibit "G"—Report of Dr. D. D. Lum	59
Exhibit "H"—Copy of statement on letterhead of Dr. Donald D. Lum and Dr. Paul L. Jones	59
Exhibit "I"—Copy of statement on letterhead of Dr. Wm. F. Holcomb and Dr. Vernon C. Stehr	61
Clerk's certificate	62
Proceedings in U. S. C. A. for the Ninth Circuit:	
Statement of points to be relied upon and designation of parts of record to be printed	64
Motion for consolidation or briefing and argument	66
Order of consolidation	67
Order of submission	69
Order directing filing of opinion and filing and recording of judgments	69
Opinion, Healy, J.	70
Judgment	74
Clerk's certificate	74
Order extending time to file petition for writ of certiorari	77
Order allowing certiorari	79

No. 12645

**United States
Court of Appeals**
for the Ninth Circuit.

WARREN H. PILLSBURY, Deputy Commissioner for the Thirteenth Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act,

Appellant,

vs.

UNITED ENGINEERING COMPANY, a Corporation, and **FIREMAN'S FUND INSURANCE COMPANY**, a Corporation,

Appellees.

Transcript of Record

**Appeal from the United States District Court
Northern District of California,
Southern Division.**

NAMES AND ADDRESSES OF ATTORNEYS

FRANK J. HENNESSY,
United States Attorney.

EDGAR R. BONSALE,
Assistant United States Attorney,
Post Office Building,
San Francisco, California,
Attorneys for Defendant and
Appellant.

JOHN H. BLACK,

EDWARD R. KAY,
233 Sansome Street,
San Francisco, California,
Attorneys for Plaintiffs and Appellees.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 28810H

UNITED ENGINEERING COMPANY, a Cor-
poration; FIREMAN'S FUND INSURANCE
COMPANY, a Corporation,

Plaintiffs,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner for the Thirteenth Compensation Dis-
trict, Under the Longshoremen's and Harbor
Workers' Compensation Act,

Defendant.

COMPLAINT FOR INJUNCTION PURSUANT
TO TITLE 32, U.S.C.A. SECTION 921

To: The Honorable District Court of the United
States, Northern District of California, South-
ern Division:

The plaintiffs, United Engineering Company, a
corporation, and Fireman's Fund Insurance Com-
pany, a corporation, respectfully show:

I.

Plaintiff, United Engineering Company, at all
times herein mentioned has been and now is a
corporation; Plaintiff Fireman's Fund Insurance
Company, at all times herein mentioned has been
and now is a corporation. Both of said corporations

have their principal offices in the City and County of San Francisco, State of California.

II.

That plaintiff Fireman's Fund Insurance Company, a corporation, at all times herein mentioned, was the Longshoremen's and Harbor Workers' Compensation insurance carrier for said United Engineering Company, a corporation.

III.

On the 18th day of February, 1947, one, Frank S. Curnutt, was in the employ of the said United Engineering Company as a longshoreman and on said date was working as such longshoreman aboard the SS "Lurline" on navigable waters of the United States at Alameda, California.

IV.

On said date and at said place, the said Frank S. Curnutt suffered an injury to his back while employed as aforesaid.

V.

That thereafter on February 20, 1947, plaintiffs herein provided medical treatment to the said Frank S. Curnutt for the said injury.

VI.

That the plaintiff United Engineering Company duly filed with defendant on March 8, 1947, a report covering said injury in accordance with Section 30

of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 930.

VII.

That no compensation payments were ever made to the said Frank S. Curnutt, or promised by said plaintiffs, or either of them.

VIII.

That on the 17th day of January, 1949, a claim for compensation was filed with the defendant Deputy Commissioner by the said Frank S. Curnutt, alleging that the said injury of February 18, 1947, first caused disability on or about January 15, 1948.

IX.

On April 8, 1949, defendant made and entered a compensation order awarding compensation payment to the said Frank S. Curnutt, as follows:

Federal Security Agency
Bureau of Employees' Compensation
13th Compensation District

Case No. 1366-1135

Claim No. 3177

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act,

FRANK S. CURNUTT,

Claimant,

against

UNITED ENGINEERING COMPANY,

Employer,

FIREMAN'S FUND INSURANCE COMPANY,

Insurance Carrier.

**COMPENSATION ORDER
AWARD OF COMPENSATION**

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

Findings of Fact

That on the 18th day of February, 1947, the claimant above named was in the employ of the employer above named at San Francisco harbor, in the State of California; in the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Fireman's Fund Insurance Company; that on said day claimant herein, while performing service for the employer as a sheet-metal worker and engaged in ship repair operations on a completed vessel on navigable waters of the United States at said harbor, sustained personal injury arising out of and in the course of his employment and resulting

in disability as follows: while lifting a heavy object, he wrenched his back; that defendants at the first and only hearing herein asserted the contention that the claim was barred by the period of limitations described by said act; that no compensation has been paid for said injury; that the claim for compensation was filed herein on January 17, 1949, that the employer submitted to the Deputy Commissioner its first report of injury in this matter on or about March 8th, 1947; that claimant was continued in lighter work and full wages by the employer after a disability and loss of working time of six days, until his employment was terminated on January 13, 1948, and that claimant did not lose wages in excess of seven days as a result of his injury until February 5th, 1948, that the employer had knowledge at intervals throughout the entire period from February 18, 1947, to the present time that claimant was suffering distress as a result of said injury, and that the employer provided medical treatment for him therefor during said period, that therefore the claim for compensation is not barred by the period of limitations prescribed by said Act; that claimant has not incurred expense for medical treatment to date; that claimant is entitled to further medical care from time to time as needed to cure or relieve him from the effects of his injury, to be provided by defendants; that the average weekly earnings of the claimant herein at the time of his injury amounted to the sum of \$66.80; that from February 2nd, 1948, to and including November 8th, 1948, claimant lost wages on 37 scattering days in reporting to defendants' physicians for medical

care, and for a period of five weeks in June-July, 1948, in which he laid off from work as a therapeutic measure and in the hopes of recovering his health thereby; which period was approved by his physicians for said purpose; that he is entitled to compensation for 10 $\frac{2}{7}$ weeks for said period of disability amounting to \$257.14, no part of which has been paid; that claimant is still in a partially disabled physical condition as a result of his injury but has not established further loss of wage earning capacity to this time as a result thereof; that claimant's attorney, Joseph E. Smith, has rendered legal service to claimant in the prosecution of his claim for which a fee is approved in the sum of \$50.00, and lien granted therefor upon compensation herein awarded;

Upon the foregoing facts the Deputy Commissioner makes the following:

Award

That the employer, United Engineering Company, and the insurance carrier, Fireman's Fund Insurance Company, shall pay to the claimant compensation as follows:

To claimant the sum of \$257.14 forthwith, less however the sum of \$50.00 to be deducted therefrom and paid to claimant's attorney, Joseph E. Smith, upon his lien for attorney's fee.

Given under my hand at San Francisco, California, this 8th day of April, 1949.

WARREN H. PILLSBURY,
Deputy Commissioner, 13th
Compensation District.

Every payment awarded under a Compensation Order earns 20% additional if not paid within 10 days from the date it becomes due.

X.

That the evidence in the hearing before the said defendant is without conflict that the said Frank S. Curnutt sustained injury on the 18th day of February, 1947, that he received medical treatments therefor and that no compensation payments were made or promised to the said Frank S. Curnutt by the plaintiffs, or either of them.

XI.

That no claim for compensation was filed with the Deputy Commissioner by or on behalf of the said Frank S. Curnutt until more than one year after the injury of February 18, 1947, to wit: January 17, 1949.

XII.

That prior to the first hearing on said claim, plaintiffs pleaded that said claim was barred by the period of limitations prescribed by the said Longshoremen's and Harbor Workers' Compensation Act.

XIII.

That by the said Compensation Order of April 8, 1949, the plaintiffs herein are ordered to pay to the said Frank S. Curnutt the sum of \$257.14, less the sum of \$50.00 payable to claimant's attorney as attorney's fee.

XIV.

Plaintiffs are informed and believe, and upon such information and belief, allege that the said Frank S. Curnutt, claimant in the said proceedings before the defendant Deputy Commissioner, to whom compensation payments are ordered to be paid as aforesaid, is a person of no financial means and without property, and if plaintiffs should pay to him the sum awarded in said Compensation Order, they could not be recovered back and that accordingly plaintiffs will suffer great and irreparable damage and injury if said award and order is not stayed.

XV.

The said claim for compensation was not filed with the Deputy Commission until January 17, 1949, although the Deputy Commissioner found that claimant lost wages on 37 scattering days from February 2, 1948, to and including November 8, 1948, and a period of five weeks in June-July, 1948. The claim was, therefore, not filed until over eleven months after disability is first alleged to have resulted from the said injury. The defendant's award therefore has placed plaintiffs in the position of being required to pay a lump sum of money covering a period extending eleven months prior to the time claimant filed his claim for compensation.

XVI.

Plaintiffs are informed and believe that an early

date for a hearing on the merits of this matter can be had before this Honorable Court.

XVII.

Plaintiffs believe that there is a great probability that the said Compensation Order of the defendant will be set aside by this Court on the ground that said defendant had no jurisdiction to issue such Order in view of the uncontradicted evidence that the said claim was filed more than one year after the date of said injury.

Wherefore, plaintiffs pray that said Compensation Order and Award be set aside and the same and its enforcement be permanently enjoined and restrained; that in addition said compensation order may be suspended and that an order be entered for an interlocutory injunction suspending the same during the pendency of this action; that payments required by said order and award and each of them be stayed until final decision herein; and that this Court may find and adjudge that the said claim for compensation was filed more than one year after the said injury and that, therefore, the said Frank S. Curnutt's right to compensation under the provisions of the Longshoremen's and Harbor Workers' Compensation Act is barred; and that plaintiffs should not be, nor is either of them subject to or liable to pay compensation because of the said injury to the said Frank S. Curnutt; and that said claim is not within the jurisdiction or power of defendant to administer or apply as against either

plaintiff; and for such other and further relief as to the Court may seem just.

JOHN H. BLACK,

EDW. R. KAY,

Attorneys for Plaintiffs United Engineering Company and Fireman's Fund Insurance Company.

United States of America,

Northern District of California,

City and County of San Francisco—ss.

George Jordan, being first duly sworn, deposes and says:

That he is one of the officers, to wit, Vice President of the Fireman's Fund Insurance Company, a corporation, one of the plaintiffs herein; that he has read the foregoing Complaint for Injunction Pursuant to Title 33, U.S.C.A. Section 921, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters set forth therein upon information and belief, and as to these matters he believes it to be true.

/s/ GEO. JORDAN.

Subscribed and sworn to before me this 26th day of April, 1949.

/s/ LAURNA L. MACHUGH,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires January 15, 1952.

[Endorsed]: Filed April 27, 1949.

[Title of District Court and Cause.]

MOTION TO DISMISS

Now comes the defendant, Warren H. Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission, by his attorney, Frank J. Hennessy, United States Attorney, and Edgar R. Bonsall, Assistant United States Attorney, for the Northern District of California, and moves this Court to dismiss the Bill of Complaint after review of the Compensation Order filed herein, for the following reasons:

(1) That the Bill of Complaint filed herein does not state a cause of action, and does not entitle plaintiff to any relief, nor does the said Bill of Complaint state a cause of action against the defendant, Warren H. Pillsbury, Deputy Commissioner, upon which relief can be granted.

(2) That it appears from the Bill of Complaint including the transcripts of testimony taken before the Deputy Commissioner in the Compensation Order filed by him on April 8, 1949, complained of in the Bill of Complaint, was supported by evidence, and under the law said findings of fact should be regarded as final and conclusive.

(3) That it appears from the Bill of Complaint, including said transcripts of testimony, that said Compensation Order complained of herein is in all respects in accordance with law.

(4) For such other good and sufficient reasons as may be shown.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ EDGAR R. BONSTALL,
Assistant United States Attorney, Attorneys for
Defendant Warren H. Pillsbury.

This motion will be based on the complaint and pleadings now on file in this matter and the certified copy of the transcript of the proceedings in the case before Deputy Commissioner Warren H. Pillsbury now filed in this court.

[Endorsed]: Filed October 14, 1949.

In the United States District Court for the Northern District of California, Southern Division

No. 28810-Civil

UNITED ENGINEERING COMPANY, a Corporation, et al.,

Plaintiff,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, etc.,

Defendant.

Appearances:

JOHN H. BLACK,
EDWARD R. KAY,
233 Sansome Street,
San Francisco, California,
Attorneys for Plaintiffs.

FRANK J. HENNESSY,
United States Attorney.

EDGAR R. BONSALE,
Assistant United States Attorney.

MACKLIN FLEMING,
Assistant United States Attorney,
San Francisco, California.
Attorneys for Defendants.

OPINION

Goodman, District Judge.

In these four consolidated actions, the plaintiff employers and their respective insurance carriers have asked this court to set aside and enjoin the enforcement of Compensation Orders and Awards made by the Deputy Commissioner pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 USC 901-950. The question presented is whether the Deputy Commissioner lacked jurisdiction to make the awards because the claims for compensation were not filed within a year after the claimants were injured as is allegedly required by Section 13(a) of the Act. The Deputy Commissioner has moved to dismiss the complaints on the ground that the claims were timely filed and that therefore the awards were proper.

Section 13(a) of the Act provides that "The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefore is filed within one year after the death, except that if payment of compensation has been made, without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred." (Emphasis added.)

For a proper understanding of the issues presented, a brief account of the injuries suffered by

the claimants and the events leading up to the compensation awards is here necessary.

Claimant Howard Johnson on May 12, 1947, struck his head on a cross-beam of the vessel Monterey while working as a leaderman welder. The muscles of his neck were severely strained and he was unable to continue to weld aboard ship. His employer transferred him to lighter work in the machine shop at no reduction in wages. Although his neck continued to trouble him, he continued to work regularly for more than a year until he was discharged by the new owner of the ship yards because he was unable to weld aboard ship. Since that time he has been employed only intermittently because he is physically able to perform only the less strenuous types of welding operations. When Johnson first lost time from work, he was told it was too late for him to file a claim for compensation. But when he discovered how many employment opportunities were lost because of his condition, he decided to attempt to secure compensation. On January 31, 1949, more than a year and a half after the accident, he filed his claim with the Deputy Commissioner.

Claimant Frank Curnutt on February 17, 1947, while employed as a sheetmetal worker aboard the S. S. Lurline, wrenched his back when he lifted a pre-heater from the deck to a table. He did not work for several days. When he returned to his job, he was relieved of all heavy work on doctor's orders. With some discomfort, he performed lighter duties at his former wage rate until his job ended

in about a year. After resting for two weeks to give his back a chance to heal, he obtained work with the Bethlehem Steel Company. In June of 1948, he quit work for five weeks, as a therapeutic measure suggested by his physician. In July he went to work for a sheet-metal company, but soon was forced to give up this job, and subsequent ones, because the work proved too strenuous. On January 17, 1949, nearly two years after injuring his back, Curnutt filed his claim for compensation.

Claimant Louis Shallat on November 21, 1947, while working as a stevedore aboard the S. S. Mauna Lei, caught his hands between a sling and a bight. Considerable pain and swelling in his hands resulted. According to Shallat, his left hand has pained him continuously since it was injured and he has applied self-treatment. While he testified at the hearing before the Deputy Commissioner that the injury grew "more and more severe," he also stated that "the left hand is still the same as it was when I got injured." Shallat had lost no time from work up to the date of the final hearing before the Deputy Commissioner. At that hearing, Shallat stated that he did not file his claim for compensation until May 23, 1949, nearly a year and a half after he was injured, because he thought the injury "wasn't so serious," and that "it would work its way out."

Claimant Chris Manos was welding on the deck of the tanker Purisima on December 22, 1947, when he was struck on the head by an iron saddle falling from above. He was instructed by the examining

physician not to weld thereafter and consequently was given lighter work by his employer. He suffered no reduction in rating or wages. About two months later his employment terminated as a result of a general reduction in the number of men employed at the ship yard. In a week or so he obtained a shop welding job at a slightly higher wage than he had previously received at the ship yard. This job ended in January of 1949, due to a general lay off. At the time of the hearing before Deputy Commissioner on August 29, 1949, Manos was still unemployed, but was planning to engage in sales work. Manos' neck has troubled him continually since he was struck on the head and he has received regular medical treatment. In some respects the condition of his neck apparently gradually has improved and in others it has grown worse. Manos filed a claim for compensation on August 17, 1949, more than a year and a half after he was injured.

The Deputy Commissioner justified his awards to these claimants and now grounds his motion to dismiss these complaints on his conclusion that Section 13(a) of the Compensation Act sets the one-year period of limitation running, not from the date of injury, but from the date on which the injury became compensable. There may be merit to this interpretation of Section 13(a) but these causes can be determined without reaching the question.

In my opinion, the Deputy Commissioner erred in assuming that the injuries suffered by these claimants were not compensable so long as they con-

tinued to work with no reduction in wages. It is now settled law in this Circuit that a claimant is not precluded from recovering compensation under the Act because he has been paid his old wages at all times since resuming work after being injured. *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 103 F.2d 513 (1939). *Accord, Luekenbach S. S. Co. v. Norton*, 96 F.2d 764 (3 Cir. 1938); *Hartford Accident and Indemnity Co. v. Hoage*, 85 F. 2d 420 (App. D. C. 1936). The Act says nothing about "compensable injuries" but only provides that compensation must be paid for disability. Disability is defined by Section 2(10) as "incapacity because of injury to earn wages which the employee was receiving at the time ~~of~~ injury in the same or any other employment." The statute makes earning capacity the test. Earning capacity may be properly defined to mean ability to earn, rather than wages actually received. And this means ability to earn in the open labor market, not ability to secure exceptional consideration from a sympathetic employer.

Although their employers did not reduce their wages, claimants Johnson, Curnutt, and Manos were physically unable, following their injuries, to perform the same duties they had previously performed. Pain and suffering were continuous. They were well aware that unless there was improvement in their physical condition, they would be unable to again engage in strenuous activity. Claimant Manos admitted that he was told by the physician, who examined him following his injury, that he could obtain compensation. Instead of doing so, at the same physician's suggestion, he sought and ob-

tained from his employer lighter work at his former wages.

Claimant Shallat apparently continued to perform the same duties following his injury as he had before. But, if his statements to examining physicians are accepted as true, he was in constant pain. The Compensation Act does not deny relief to an injured workman until his pain exceeds endurance.

All four of the present claimants have been disabled within the meaning of the Longshoremen's and Harbor Workers' Compensation Act since the day they were injured. Consequently they had compensable claims.¹ Such claims were not timely filed. It follows that the awards of the Deputy Commissioner were not within his power to make. The court is aware of the well established rule that the Deputy Commissioner's findings of fact should not be disturbed if there is any substantial evidence to support them. But his conclusion that these claimants suffered no disability until long after they were injured is based on an error of law. The undisputed factual record shows that the earning capacity of these men was impaired from the time of injury.

The delay in the filing of these claims is wholly understandable. None of these claimants appear to have been fully aware of his rights and obligations under the Compensation Act. And, even had these men realized the consequences of delay, it is only natural that they should hesitate to jeopardize their

¹See *Liberty Mutual Insurance Co. v. Parker*, 19 F. Supp. 686 (Md. 1937) in which the same conclusion was reached on somewhat similar facts.

opportunity to continue working at their former wage rate by pressing claims for compensation. In a relatively short time the wages of these claimants would have equaled the maximum awards they could ever hope to receive. These, however, are considerations for the lawmakers and not for the Courts.

The motions to dismiss are denied and the awards are severally set aside and vacated.²

Dated May 10, 1950.

[Endorsed]: Filed May 11, 1950.

²The above order in fact fits the issues raised by the pleadings. But in order to technically comply with the rule announced by our Court of Appeals in *Twin Harbor Stevedoring & Tug Co. v. Marshall*, supra, the causes are transferred to the Admiralty docket, the motions will be treated as exceptions and are overruled and a decree will enter vacating and setting aside the awards.

In the United States District Court for the Northern District of California, Southern Division

No. 28810

UNITED ENGINEERING COMPANY, a Corporation, et al.,

Plaintiff,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, etc.,

Defendant.

ORDER AND DECREE

In the above-entitled case the motion to dismiss is denied and the award is severally set aside and vacated.

It is further ordered that the above-entitled case is transferred to the Admiralty docket, the motion will be treated as exception and is overruled and a decree is hereby entered vacating and setting aside the award.

Dated at San Francisco, California, this 11th day of May, 1950.

/s/ LOUIS E. GOODMAN,

United States District Judge.

(As amended by order of August 23, 1950.)

[Endorsed]: Filed May 11, 1950.

[Title of District Court and Cause.]

—NOTICE OF APPEAL—

Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, defendant in the above-entitled action, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final order of this Court filed on May 11, 1950, denying the motion of the defendant to dismiss the complaint and vacating and setting aside the order of the defendant awarding compensation dated April 8, 1949.

Dated: July 3, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ EDGAR R. BONSALE,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed July 3, 1950.

United States Federal Security Agency
Bureau of Employees Compensation

Before: Warren H. Pillsbury,
Deputy Commissioner, 13th Compensation
District.

Case No. 1366-1135

Claim No. 3177

FRANK S. GURNUTT,

Claimant,

vs.

UNITED ENGINEERING CO.,

Employer,

FIREMAN'S FUND INSURANCE CO.,

Insurance Carrier.

TRANSCRIPT OF TESTIMONY
AT HEARING

January 31, 1949

Pursuant to notice, this matter was heard before Warren H. Pillsbury, Deputy Commissioner, Bureau of Employees Compensation, at the Coroner's Court, at 480 Fourth Street, Oakland, California, on Monday, the 31st day of January, 1949, at 10:30 a.m.
Appearances:

Claimant present in person and represented by Joseph E. Smith, attorney; accompanied by Mr. Child, representative, Sheet Metal Workers Union.

Defendants represented by B. W. Greenough, claims superintendent.

L. P. Smith, Reporter.

Mr. Pillsbury: Hearing on claim for compensation. Claimant states that his attorney, Joseph E. Smith, is coming. Apparently, he has been detained. To save time, as I have other cases on the calendar, I will note the preliminary matters to be taken up, and then wait for Mr. Smith's appearance.

In this matter, the claim is for an injury of February 18, 1947, to the back, the injury being considered at the time not to involve loss of over one week's time from work. No compensation was paid. The claim was filed January 17, 1949. The matter came to my attention on a letter from Mr. Smith, claimant's attorney, of December 23, 1948, asking that the matter be taken up for conference or hearing. Informal conference was held at Oakland on January 10, at which time no agreement was reached, and arrangement made for filing a formal claim. The matter now comes on for hearing on said claim.

Mr. Greenough, what is defendant's position, for the record?

Mr. Greenough: We raise the issue of nature and extent of disability, liability for compensation and medical expense and plead the claim is barred by the statute of limitations.

Mr. Pillsbury: I have the following medical reports in my file which are exhibited for introduction in evidence: [2*]

Report of Dr. Donald D. Lum, of Alameda, of February 20, 1947, received as Exhibit "A";

Report of Dr. V. C. Stehr, of May 18, 1948, Exhibit "B";

Report of Dr. V. C. Stehr, of June 21, 1948, Exhibit "C";

Report of Dr. Paul L. Jones, of July 19, 1948, Exhibit "D";

Report of Dr. V. C. Stehr, of October 28, 1948, Exhibit "E";

Report of Dr. Geo. J. McChesney, of November 26, 1948, Exhibit "F";

Have you any further medical reports, Mr. Greenough?

Mr. Greenough: No, I haven't, Mr. Pillsbury.

Mr. Pillsbury: Have you given copies of these reports to claimant's attorney?

Mr. Greenough: Yes, I have.

Mr. Pillsbury: We will suspend.

Reconvened on arrival of Joseph E. Smith, Claimant's attorney.

Mr. Pillsbury:

The Following Facts Are Agreed to By the Parties:

1. That claimant Frank S. Curnutt was in the employ of defendant United Engineering Company at Alameda, California, on and about February 18, 1947, as a sheet metal worker, and at said time said employer was insured against liability under the

Longshoremen's and Harbor Workers' Compensation Act by insurance in defendant Fireman's Fund Insurance Company; [3]

2. That claimant was injured on said date, said injury occurring in the course of ~~of~~ and arising out of his employment;

3. That medical treatment was furnished to some extent by defendants;

4. That claimant's average earnings at said time may be taken at \$66.80 a week, not including overtime for which there is no record available at the present moment;

5. That no compensation has been paid;

6. That claimant was performing service at said time if ship repair work on a vessel on navigable waters of the United States, and the claim is within the provisions of said act.

The Issues Are:

1. Nature and extent of disability;

2. Liability for medical expense;

3. Whether the claim is barred by the period of limitations prescribed by the Longshoremen's and Harbor Workers' Compensation Act.

Mr. Pillsbury: Any other issues, Mr. Greenough?

Mr. Greenough: No.

Mr. Pillsbury: On the matter of limitations, the record may show that my file contains only one employer's report of injury, which is dated March 7, 1947, and was received in my office December 28, 1948. [4]

Mr. Smith: Does that indicate that your office did not get notice of the claim until December 28?

Mr. Pillsbury: I cannot be sure about it because we have had some difficulty with filing of no lost time reports and my file does not indicate whether such reports for 1947 have been searched carefully at this time or not. However, none is in the file of the present case. The no lost time reports are not made up and given numbers as they are received, but are filed in bundles and eventually moved to our dead storage space.

Mr. Greenough, you have a witness who desires to get away?

Mr. Greenough: Yes, Mr. Gaughran.

JAMES A. GAUGHRAN

having been first duly sworn, testified as follows:

By Mr. Pillsbury:

Q. Your name, please?

A. James A. Gaughran.

Q. You are an attorney? A. Yes.

Q. Were you in February, 1947, representing the United Engineering Company? A. Yes.

Mr. Pillsbury: What is the purpose of this testimony, [5] Mr. Greenough?

Mr. Greenough: To show the copy of this Form 202 was mailed to Mr. Gaughran's office.

Mr. Pillsbury: What inference do you draw from that?

Mr. Greenough: I draw the inference that the

(Testimony of James A. Gaughran.)

original was mailed the same time to your office.

Q. (By Mr. Pillsbury): Mr. Gaughran, did you receive a copy of the employer's first report of injury to Frank S. Curnutt of February 18, 1947?

A. Yes, I did.

Q. When did you receive it?

A. It was received in our office March 10, 1947.

Q. Let me see it. The document seems to be identical with the same dated March 7, and filed in my office December 28, 1948.

Mr. Pillsbury: Any other questions?

Mr. Greenough: No.

Mr. Smith: I have no objection to the man's testimony only for the fact that his office allegedly received a copy on March 10, 1947. Now what conclusions—

Mr. Pillsbury: The testimony does not apply unless connected up with the original copy sent to my office. That is all, Mr. Gaughran. Thank you. Anything else?

Mr. Greenough: I would offer it in evidence if I could withdraw it for copies. [6].

Mr. Smith: I object to it as being incompetent, irrelevant and immaterial.

Mr. Greenough: I think possible for the purpose of signature it would be well to admit it.

Mr. Pillsbury: I will withhold ruling until some evidence comes in to connect it up.

ELLA BETTENCOURT

having been first duly sworn, testified as follows:

Q. Your address?

A. 215 Market Street.

Q. By whom are you employed?

A. Matson Navigation Company and United Engineering Company.

Q. Were you employed by them on February 18, 1947?

A. Yes.

Q. In what capacity?

A. Stenographer in the insurance department.

Mr. Pillsbury: Take the witness, Mr. Greenough.

Q. (By Mr. Greenough): Miss Bettencourt, in your position is it part of your duties to prepare forms for the Federal Security Agency in connection with injuries of United Engineering and Matson employees?

A. Yes. [7]

Q. One of those forms is a Form 202?

A. Correct.

Mr. Pillsbury: That Form 202 is the form I have referred to as employer's first report of injury.

Q. (By Mr. Greenough): How many copies do you make?

A. Original and two.

Q. What is the procedure?

A. The original to Mr. Pillsbury's office, one copy to the Fireman's Fund and one copy for our file.

Q. By Fireman's Fund you mean Mr. Gaughran's office?

A. Yes.

(Testimony of Ella Bettencourt.)

Q. Have you examined your file in this matter of Mr. Curnutt? A. I have.

Q. Did you find a copy of Form 202?

A. I found one carbon copy.

Mr. Pillsbury: Of what date?

A. Of March 7.

Q. (By Mr. Greenough): Is this the copy?

A. Yes (indicating copy previously offered in evidence).

Q. This is not the copy that was offered in evidence. It is an unsigned copy for my file. Is this the only copy your file contains?

A. Yes, it is. [8]

Q. Now, the date March 7, 1947, on the left hand corner, what does that indicate?

A. That indicates the date the report was made out and mailed.

Q. Is it your practice to mail the reports the same day they are made?

A. I mail them daily.

Q. (By Mr. Pillsbury): Did you *always* at that time mail a copy to me at the time that you mailed the copy to the insurance company's attorney?

A. Yes.

Q. (By Mr. Greenough): How long have you worked in your present occupation?

A. Over six years.

Mr. Greenough: That is all.

Q. (By Mr. Smith): You don't specifically remember making out a report on Mr. Curnutt?

(Testimony of Ella Bettencourt.)

A. I cannot remember definitely that far back.

Mr. Smith: That is all.

Mr. Pillsbury: I will have a search made through our no lost time files for 1947 to see if the Curnutt report can be found and will forward the parties a statement of the clerk in my office who will make such search as to what is found. I will receive the report offered a few minutes ago by Mr. Greenough as Exhibit "G".

Mr. Smith: Is that report received in evidence for identification only at this time?

Mr. Pillsbury: No, I think it can be received fully for what it may be worth.

FRANK S. CURNUTT

claimant, having been first duly sworn, testified as follows:

By Mr. Pillsbury:

Q. What is your full name?

A. Frank Samuel Curnutt.

Q. Your address?

A. 428 Spring Street, Apartment 1-A, Richmond.

Q. Your occupation?

A. Sheet metal worker.

Q. You were working, were you, for United Engineering Company on February 18, 1947, on the S.S. "Lurline"?

A. Yes, sir.

Q. Did you meet with an accident at that time?

A. I did.

(Testimony of Frank S. Curnutt.)

Q. What happened to you?

A. I was picking up what is called a pre-heater that goes in the stateroom, and I just picked it up off the deck which was 30 inches high and set it on the table approximately this high in front of me, and in that twisting position snapped something in my back, and it was about 30 [10] minutes before quitting time, if that is of any interest to you, and I did not report it that day. By the time I got home I was so sick the fellow I was riding with, I told him to tell the supervisor I wouldn't be there the next day, and the next day I went in, and they sent me over to the hospital, and I went over to Dr. Jones in Dr. Lum's office, and I was off four more days after that.

Q. Dr. Lum's report is dated February 20th, but I don't find the date given on which you reported to him. It would be either the 19th or 20th?

A. It would be the 20th. This (indicating on report) is the day I was injured and I stayed home in bed the next day.

Q. Line 14 of Exhibit "A," date of first treatment, February 20, 1947. Did you lose more than seven days time from work on account of this injury at that time?

A. Not at that time, no, I didn't because when I went in that second day the doctor there at the hospital in the yard insisted that it would be better for me if I continued working, but I felt so bad—

Q. Did you continue working?

(Testimony of Frank S. Curnutt.)

A. Well, I missed four days, missed one, worked one, missed four, and then reported back.

Q. How long did you continue working after that? A. Nearly a year after that. [11]

Q. Then what happened?

A. I was going to say in the time that I come back there the doctor said, "You must not do heavy work." So my supervisor understood that, so I was specially relieved of all heavy work.

Q. When did you next lose time from this injury?

A. I was on swing shift and I was terminated, well, in January of 1948, and so my back—I didn't go to work because my back was bothering me so much, so I took off two weeks.

Q. Well in January, 1948, did your employment cease?

A. Well, I cannot say exactly but I think it was around the 14th or 15th of January of 1948, because I think I drew one full check and a partial check.

Mr. Pillsbury: Mr. Greenough, can you verify the date from your records?

Mr. Greenough: Our records show that it was the 13th.

A. It could be, somewhere. I knew I drew one full check in January.

Q. (By Mr. Pillsbury): Was there any change in your condition at that time?

A. I couldn't say. There was none for the better or worse. It continued static.

Q. When did you next go to work?

(Testimony of Frank S. Curnutt.)

A. As I say, I was off two weeks. Then in the meantime [12] I contacted his office, but around the first of February, maybe the latter part of January or the first of February, I went to work for Bethlehem Steel Company in San Francisco and I worked there.

Q. Were you disabled from labor on account of your condition between January 13, 1948, and the time you went to work for Bethlehem Steel?

A. No, I wasn't other than just a great discomfort when I worked at any time, on account it hurts me when I stoop over or reach with my hands above my head.

Q. How long did you work at Bethlehem?

A. Somewhere from the first of February until the 15th or 14th of June, I believe, 1948.

Q. What have you been doing since then?

A. If you mind a little history in there, my back was bothering me so bad I went to Dr. Lum and Jones and Stehr and they suggested—I told them I wanted to take a vacation and see if inactivity would improve my back any, so I took five weeks vacation and got Mr. Greenough's consent. It was agreeable to him. The doctors thought it might help. One of the doctors even suggested after I came back and went to work, I came back in July, about the 17th or 18th, I took another job and I worked on that—

Q. With what employer?

A. Glen Moore Sheet Metal, East Oakland. I worked [13] there until September 24th, when this stomach trouble come up at that time.

(Testimony of Frank S. Curnutt.)

Q. You had some stomach ulcers about that time?

A. Yes, and during the time I worked for this sheet metal company out there my back bothered me very bad. The parties I was working with can substantiate that fact.

Q. That was what time?

A. That was between approximately July 15th and September 24, 1948.

Q. According to the medical file placed in evidence, you reported to Dr. Stehr on April 26, 1948?

A. Yes.

Q. That was the first time you sought medical treatment after your termination?

A. No. Mr. Greenough has a file. Here is all the treatment I took at Dr. Jones and Dr. Lum.

Q. Here is a list of a number of treatments with dates, and you are offering this in evidence, are you?

Mr. Smith: I am offering no objection from counsel.

Q. (By Mr. Pillsbury): This is a list from the office of Dr. Lum and Dr. Jones?

A. I got that from Dr. Lum and Jones. I went over and requested it. They typed it and sent it to me through the mail.

Mr. Smith: I notice it states here—probably it should [14] be 1947 rather than 1948.

Mr. Pillsbury: Yes.

A. That is right. There is no record there of my 1947 other than the first one.

(Testimony of Frank S. Curmatt.)

Q. (By Mr. Pillsbury): How many treatments did you get in February, 1947?

A. They don't have it down there. I don't know why.

Q. You tell me according to your memory how many times did you go to Dr. Lum's office in February and March, 1947?

A. I went twice a week.

Q. How many times did you go?

A. I went twice a week for approximately a month, and then he said that he thought once a week.

Q. I am speaking now commencing with February 20, 1947?

A. That is right. That is February, and he kept treating me with diathermy and back injections.

Q. They have only noted one visit in February, 1947, according to this report?

A. I notice that on there, but I don't know why they did.

Mr. Pillsbury: Received in evidence as Exhibit "H."

Q. Did your back get worse in January or February 1948?

A. I wouldn't say that it got worse.

Q. Why did you go back to the doctor for more treatment, apparently, commencing January 16, 1948? [15]

A. When Dr. Jones was treating me, that is who gave me the treatment instead of Dr. Lum, they were both in the same office, he said he didn't think further treatment—

(Testimony of Frank S. Curnutt.)

Q. Why did you go back for treatment in January, 1948?

A. Because my back was bothering me very bad. It did continue all that time.

Q. Had it gotten worse up to January 16, 1948?

A. It hadn't gotten worse since I first got hurt, but it didn't improve any after the first two months.

Q. After the first two months, that is, after about April, 1947, did your back get any worse in January, 1948, than it was from April to January?

A. No, it continued just about the same.

Q. Then why did you go back for more treatment commencing January 16, 1948?

A. The reason I went back for more treatment was that, as I told you, they put me on work that was very light where I didn't have to do very strenuous work. Then I knew it was going to be terminated and I knew I couldn't go to an outside job and do my regular sheet metal work, which is hard work, and I went back to Dr. Jones, and he sent me to Dr. Greenough and convinced them that my back was still hurting, and they re-opened the case for further treatment.

Q. That was about January 16, 1948? [16]

A. If I was terminated January 13th, it was before that. It must have been January 10th, or something like that, I went to him. I cannot swear to the exact date because that is just from my memory.

Q. How much time are you claiming compensa-

(Testimony of Frank S. Curnutt.)

tion for up to the present for this back in jury?

A. Well, to tell you the truth, I hadn't thought of the exact dates, or anything like that.

Q. What are you claiming now? What do you want?

A. I am claiming a disability that is still there. These men prove to me that my back is all right and which I know it isn't, regardless.

Q. What do you mean by disability?

A. Well, I mean that I am going to have to give up my sheet metal work and my present rate of pay.

Q. You claim to have a bad back?

A. That is right.

Mr. Pillsbury: Mr. Smith, what disability compensation do you understand the claim is here for?

Mr. Smith: Well, he advised me that he had lost a day every time he was examined and every time he had to report for treatment in the past year. Now, if he wishes to waive that, that is all right with me, plus the fact that he does have a disability that he needs medical treatment for. [17]

Mr. Pillsbury: Going back to Exhibit "H," may it be stipulated that the second, third and fourth dates in the column headed "1947," that the date "1948" is incorrect and should be changed to 1947?

Mr. Greenough: I don't know.

Mr. Pillsbury: On the appearance of the sheet, it would seem as if those three dates, February 24; 28 and March 6, under the caption "1947" should read 1947?

(Testimony of Frank S. Curnutt.)

Mr. Greenough: It would seem so.

Mr. Smith: Those are the examinations by Dr. Holcomb and Dr. Stehr. You might make those part of Exhibit "H."

Mr. Pillsbury: Presents list of 14 visits on bill-head of Dr. Holcomb and Dr. Stehr commencing April 26, 1948, received in evidence as Exhibit "I."

Q. (By Mr. Pillsbury): Who sent you to Dr. Holcomb and Dr. Stehr? A. Dr. Jones.

Q. And has their treatment been paid for by the United Engineering, do you know?

A. I didn't pay it. I guess it was paid by them. I never was billed for it.

Q. Was anything said to you at any time after you went back for more treatment about your rights under the compensation act? Was there any discussion?

A. Not by the doctors there, no sir. [18]

Q. You say you called on Mr. Greenough here before you went back to Dr. Lum in January, 1948?

A. No, I went to Dr. Lum and Jones, I seen Dr. Jones.

Q. Who did you speak to for the employer before you went back to them?

A. I went to them first and he sent me to Mr. Greenough.

Q. And in your conversation with Mr. Greenough was anything said about compensation or keeping your case open?

A. Well, I don't remember that there ever was.

Q. Did you ask for compensation payments?

(Testimony of Frank S. Curnutt.)

A. No, I didn't because I was interested just in getting my back taken care of.

Q. Have you incurred any medical expense for medical treatment?

A. Nothing, only just the time lost on the days of examination.

Q. You haven't had to pay a doctor anything?

A. No. I trusted their doctors. I thought they were as good as I could pick myself and I trusted them.

Q. This brings your list of visits to the doctor down to November 8, 1948. Have you lost any time from work on account of your work since then to the present time?

A. No, I cannot claim that I have.

Mr. Pillsbury: Mr. Smith, do I understand correctly, [19] then, that the only contention is for a day's compensation for each time he went to the doctors up to the present time?

Mr. Smith: That is correct.

Q. (By Mr. Pillsbury): How is your back now?

A. Well, it is bothering me very much. I sleep about from 4 to 5 hours of a night and then I wake up and from then until morning I am very uncomfortable.

Q. Why did you wait so long before filing a claim for compensation?

A. Well, I was in hopes that my back could be cured, and I would be very thankful for that, and then I went over to Dr. McChesney and he was to get me the belt. I waited a month and heard nothing from him. I said, "That is the brush off

(Testimony of Frank S. Curnutt.)

from the company." I went to the Union agent and he recommended a lawyer, and he recommended Mr. Smith.

Mr. Pillsbury: Mr. Smith, any questions?

Q. (By Mr. Smith): When you first injured your back you reported to Dr. Jones, that is, the office of Dr. Lum and Dr. Jones?

A. Yes. I went to the little hospital in the yard and they sent me in their own transportation there that day.

Q. For 1947 you appear to have listed only four times [20] which you were seen by Dr. Lum and Dr. Jones. Did you go to their office for treatment more than that?

A. Yes, there was continuous treatment for, it must have been from February until, well, I wouldn't say, but I should say that should be March 6, 1947, you know; never less than once a week for that time.

Q. In other words, from February, the time you were injured until March 6th you went at least twice a week? A. I would say so.

Q. Did you go also to the yard, the little hospital in the yard, for treatment?

A. No, I would just go there to get my pass to go out to go there. That was the first few treatments and right after that I transferred to swing shift.

Q. And then you received notice that they were going to terminate your services around the middle of January, 1948? A. Yes.

(Testimony of Frank S. Curnutt.)

Q. Up to that time the company had given you light work? A. That is true.

Q. And you lost no time from work?

A. No, I hadn't.

Q. In fact, when you were off in February for a few days they paid your wages? [21]

A. No. When I was terminated.

Q. I mean right after you were hurt in February, 1947?

A. No, I received no wages only just the days I reported for work.

Q. You did not lose any time then?

A. I lost five days.

Q. Who made this note here on this side, "Wages paid; no time lost"?

A. I don't know about that. That is the first time I ever seen that copy. I don't know a thing about it.

Q. You didn't write that on there?

A. No, I never seen that copy before that. That is not the original copy, the one I gave you.

Q. Yes, I got that from our file.

A. I had seen it then, but I didn't put that on there.

Q. You did light work until your services were terminated in January, 1948? A. Right.

Q. And then you knew you were going to be terminated, so you went to Dr. Lum?

A. Yes.

Q. Why did you go to see Dr. Lum?

A. Because I knew that my back needed further attention. Dr. Jones was the one treating me. He

(Testimony of Frank S. Curnutt.)

said, "Now, I don't think further treatment at this time will help you, so you go ahead and work and try it for a few months," he said, [22] and I did. I went ahead and did just like he said. It was very easy, and at night at home I kept a hot water bottle on my back, and so it went on, and when I knew I was going to be terminated I knew I needed further treatment.

Q. (By Mr. Pillsbury): During the time you continued on lighter work until January, 1948, did you draw the same rate of pay? A. Yes, sir.

Q. (By Mr. Smith): You felt if you were going to go some place else you had to do your regular work and you could not do it?

A. That is right.

Q. Then he referred you to Mr. Greenough?

A. Yes.

Q. What did Greenough say about medical treatment or medical care? What did he say?

A. He sent me back to Dr. Jones.

Q. What did he say? What were his exact words, if you remember?

A. I cannot swear to his exact words. I really cannot, but he knew my back was injured before.

Mr. Pillsbury: What was the gist of his remarks?

Q. (By Mr. Smith): You came in and you said to him what, and what did he say to you?

A. I went and talked to him and asked him, I says, [23] "Well, I am going to be terminated over there and my back is still bothering and is just as bad as it was the first few months it was injured,

(Testimony of Frank S. Curnutt.)

and I wonder if you could go to bat for me and keep me still working for the United Engineering because I knew they were still going to have a lot of men on day shift, where swing shift was terminated." He said, "I just cannot do it because we have several men in the same condition, I would say, that you are in." I said, "My back is still bothering me." So between he and I it was agreed it was all right for me to go back to Dr. Jones for examination and treatment, which I received.

Q. He told you to go back to Dr. Jones for examination and treatment?

A. Yes, that is true.

Q. And then you kept going to Dr. Jones almost three or four times a month from January, 1948, until June or July, 1948?

A. That is true.

Q. Did the doctor ever present you with any bills at any time?

A. No, sir.

Q. (By Mr. Pillsbury): What is the last job you have worked on?

A. The last job I was working on I was working for the telephone company. [24]

Q. How long did you do that?

A. I worked from the 18th of December to the 13th of January, this year.

Q. Are you working now?

A. No, sir.

Q. You have done no work since that last job?

A. No, and if I may add something in regard to the last job, the reason I had to leave the last job is because the telephone sets were very heavy and I could not lift.

(Testimony of Frank S. Curnutt.)

Q. Are you looking for work now?

A. Sure, absolutely. I am going out on a job in the morning. I don't know what that is going to turn out.

Q. Sheet metal work?

A. It is going to be sheet metal work. I am going to get \$2.20 an hour for it.

Q. (By Mr. Smith): What are your complaints with reference to the back now? Are you able to do the same type of work you did before?

A. No, sir. If there is heavy lifting I have to give the job up.

Q. (Mr. Pillsbury): Do you get more a day now than you were getting at the time you were hurt? A. Yes, sir, the wages are increased.

Q. (By Mr. Smith): After you first saw Mr. Greenough in [25] January, 1948, have you talked to him since then?

A. Yes, I talked to him in June, 1948.

Q. What was the reason you went to see him in June, 1948?

A. I talked to the doctor. I wanted to take a little trip. They suggested that I go and get Mr. Greenough's o.k. before I took any trip that might further injure my back. He agreed it was all right. I was off five weeks on my own because I wanted to give it a chance if inactivity would help it any.

Q. Did you have any discussion at that time if anything happened on your vacation?

A. No.

Q. (By Mr. Pillsbury): What was the period

(Testimony of Frank S. Curnutt.)

of vacation? A. Approximately five weeks.

Q. When?

A. It started before the middle of June, 1948, and then I think I went back to work somewhere around the 20th of July, 1948.

Mr. Smith: There isn't any claim that the insurance company hasn't been furnishing the medical treatment?

Mr. Greenough: Not as far as I know.

A. If I might enter something, I haven't had any treatment.

Q. (By Mr. Smith): What treatment you have had the insurance [26] company has been paying for it? A. That is right, sure.

Mr. Pillsbury: There is no period of limitations on medical treatment as far as we are advised now. You should furnish any further medical treatment that would be of any value.

Mr. Greenough: Yes.

Mr. Pillsbury: I notice in Dr. McChesney's report he recommends a belt, and also that focal conditions be gone into, especially the tonsils and sinus condition. You will have that done?

Mr. Greenough: Yes, I will.

Mr. Pillsbury: Anything else?

Mr. Smith: Mr. Referee, it appears to me in such a type of situation you have here, the man has suffered no loss of time from work until approximately after he left the company and went to work for other employers, at which time he lost a day here or a day there when he needed medical treatment.

(Testimony of Frank S. Curnutt.)

Now, I think under such a situation as that, particularly when the claimant saw Mr. Greenough just about a week or two before the statute of limitations would normally run that possibly I think an obligation or duty on his part to advise him as he was leaving the company that there might possibly be the statute of limitations involved. [27]

Mr. Pillsbury: You mean that there was some estoppel?

Mr. Smith: Yes, the fact that he had been furnished treatment right along even after he saw Mr. Greenough lulled the man into a sense of security. He did not know his rights.

Mr. Pillsbury: I doubt your record shows estoppel. However, I am looking at the matter from another point of view. There are various decisions holding the period of limitations does not commence to run until the first onset of compensable disability is in effect; that is, the date the claimant was first able to claim something because his cause of action accrued. His cause of action did not accrue because there was less than seven days disability, and the time he first completed seven days of disability may have been within a year before the filing of his claim.

Mr. Greenough: I might point out in that connection he has testified his condition is the same.

Mr. Pillsbury: Compensation is payable for loss of time from work, not mere pain and suffering. Disability is loss of wages due to injury. Anything else on this case?

(Testimony of Frank S. Curnutt.)

Q. (By Mr. Smith): On these dates that you went to Dr. Jones, for treatment, you lost a whole day's work?

A. Practically all the time because I was working in San Francisco and I was taking treatments in Oakland. [28]

Q. Also Dr. Holcomb and Dr. Stehr?

A. The same proposition.

Q. That is 1948? A. Yes.

Q. (By Mr. Pillsbury): Your home at this time was where?

A. The same address, 428 Spring Street, Richmond.

Q. You went occasionally to Dr. Lum. Where is his office?

A. He is in Oakland, but most of my treatment was at Alameda.

Q. The office of Dr. Holcomb and Dr. Stehr is also in Oakland?

A. Oakland, and Dr. Jones and Lum in Oakland.

Q. (By Mr. Smith): During 1948 most of the time you were working in San Francisco, you lived in Richmond, and came to Oakland for treatment?

A. Yes, that is right.

Q. This last job you had was December 16th terminated?

A. No, it terminated January 13th.

Q. You are going to start work tomorrow?

A. Tomorrow.

Mr. Pillsbury: Mr. Greenough, do you wish to adjust his transportation expense for getting medi-

(Testimony of Frank S. Curnutt.)

cal treatment outside the record, or do you wish an order on it?

Mr. Greenough: Possibly we will adjust it out of the [29] record. It is immaterial to me.

Mr. Pillsbury: Why don't you pay him his medical expense and I will delete that from the decision.

Mr. Greenough: Yes, sir.

Q. (By Mr. Greenough): You stated that you continued to work at United after you returned in February, 1947, without losing time until you terminated? A. That is right.

Q. When you came to see me in January of 1948, you knew you were to be terminated then, did you?

A. Yes.

Q. Were you looking for other work at that time? A. No, sir.

Q. Didn't you start to look for work when your work terminated?

A. How do you want me to answer that?

Q. (By Mr. Smith): He is asking you a question. I wasn't there.

A. All right. After they terminated me I decided I would take off two weeks.

Q. On vacation?

A. Yes, I just took it off to see how my back was going to get along, and I was hesitating about going to these other places because I knew if I was put on hard work I would be checking out. [30]

Q. (By Mr. Pillsbury): Then you looked for more work? A. Yes.

(Testimony of Frank S. Curnutt.)

Q. You returned to Bethlehem?

A. I don't know the exact date.

Q. You took off two weeks in all to try to rest your back and improve it? A. Yes.

Q. Did you talk to—

A. After I came back after my five weeks vacation Dr. Stehr said, "What you need is about six weeks in a hot springs to clear your back."

Q. Did either doctor advise you to take the vacation before you took it? Did you talk to any of the doctors before you went on the vacation?

A. No, I didn't because I made that my own decision because I knew I needed it. I had to have it to continue on.

Q. But it was later approved by Dr. Lum?

A. It was approved by all doctors, including Mr. Greenough.

Q. (By Mr. Greenough): This was your vacation in June and July, 1948?

A. That is right.

Mr. Greenough: No further questions.

Mr. Smith: That is all. [31]

Mr. Pillsbury: You are entitled to claim for those two vacation periods, at least for partial disability, in addition to the days you went to the doctor for treatment commencing January, 1948. You had to take time off from work?

A. Sure.

Q. And you lost pay for that day?

A. Absolutely.

Mr. Pillsbury: Anything further?

(Testimony of Frank S. Curnutt.)

Mr. Smith: That is all.

Mr. Pillsbury: Case submitted, except I will have a member of my staff to make a further search for the employer's first report, and will notify the parties as to the results of such search.

Attorney fee requested.

I hereby certify that the foregoing is a correct transcript of the testimony and proceedings taken in the above matter at the hearing held on the 31st day of January, 1949.

/s/ L. P. SMITH,
Reporter. [32]

EXHIBIT "A"

Copy of excerpt from report of Dr. Donald D. Lum, February 20, 1947:

"6. Date of accident: 2-18-47.

"7. State in patient's own words where and how accident occurred: Wrenched back while lifting pre heater.

"8. Give accurate description of nature and extent of injury and state your objective findings: Spasm of lumbar muscles. Tenderness on palpation.

"9. Will the injury result in (a) Permanent defect? No.

"10. Is accident above referred to the only cause of patient's condition? Yes.

"1. Is patient suffering from any disease of the heart, lungs, brain, kidneys, blood, vascular system or any other disabling condition not due to this accident? No.

"12. Has patient any physical impairment due to previous accident or disease? No.

"13. Has normal recovery been delayed for any reason? No.

"14. Date of your first treatment: 2-20-47. Who engaged your services? Employer.

"15. Describe treatment given by you: Back injected with 1/2% procaine and strapped.

"16. Were X-rays taken? No.

"17. X-ray diagnosis:

"18. Was patient treated by any one else? No.

"19. Was patient hospitalized? No.

"20. Date of admission to hospital:

"21. Is further treatment needed? Yes. For how long? Unknown.

"22. Patient able to resume regular work on: No time lost.

"/s/ DONALD D. LUM, M.D."

EXHIBIT "B"

Copy of excerpts from report of Dr. V. C. Stehr,
May 18, 1948:

"* * * History: Mr. Curnutt stated in the latter part of February, 1947, while on duty for the United Engineering Company as a sheet metal worker, he was picking up a small heater weighing about 40 pounds. As he was picking up the heater, the trunk was twisted towards the right and he then attempted to lift the heater and twist towards the left. According to his statement, he felt a sudden snap in the lower portion of his back with immediate severe pain localized to the lower mid-line of his back. Inasmuch as there was one hour remaining before quitting time, he was able to complete his day's work, but the pain in the lower portion of his back became more severe and agonizing as the time progressed. The following day the back discomfort was so severe that he was unable to work. He then reported to the office of Dr. Lum and Dr. Jones of Alameda, and diathermy treatments were given at intervals of twice a week. These have been continued for a period of two months. X-rays of the lower back were made on the 16th of January, 1948. After a period of five days, he again returned to his usual occupation but continued to notice a considerable amount of pain and discomfort in the lower portion of his back. This patient was also fitted with a low back support which has not given any appreciable relief from the back discomfort. The patient states that it is primarily at night when

he attempts to rest that he has his greatest discomfort. . . .

“Present Complaints: His present complaints consist of a constant dull pain in the lower portion of the back when is aggravated primarily by standing with his arms over his head and also when the spine is flexed and extended. . . .

“X-ray Examination: The X-ray films made at the Alameda Hospital on the 16th of January, 1948, and bearing the number 55001 were reviewed. These are X-ray films which cover the lower thoracic, lumbar, and lumbosacral joint areas. They do not reveal any evidence of fracture, dislocation, or other former joint disease.

“Diagnosis: 1. Healed sprain of the superspinous and interspinous ligaments at the level of the fifth lumbar and first sacral segment with fibrosis.

“Comment: It seems very probable from the history as given by this patient and from the physical examination at the time of injury in the latter part of February, 1947, that the patient sustained a rather severe spraining injury to the interspinous ligaments of the lower portion of his back. It is my feeling that this sprain has healed with considerable scar tissue formation and it is on the basis of this that the present disability continues. I would suggest that a manipulation of the lower back be performed under sodium pentathol anesthesia and that attempts to milize this portion of his spine be carried out, further novocaine and saline injections should be of value. As is well known, injuries of this sort to the heavy ligamentous structures of the lower

portion of the back frequently cause persistent soreness and limitation of back action. The period of treatment is often times very prolonged. I do not anticipate, however that any permanent disability will result.

"/s/ V. C. STEHR, M.D."

EXHIBIT "C"

Copy of report of Dr. V. C. Stehr, June 21, 1948:

"Mr. Frank S. Curnutt was last seen in this office on June 17, 1948. He stated that following the back manipulation under sodium pentathol anaesthesia, which was performed on June 11, 1948, he was relieved of his discomfort for several days.

"At the present time, however, he continues to complain of a minor amount of discomfort in the lower portion of his back, primarily, at night after having rested for several hours. He stated, at the time of his visit, that he plans on giving up his present employment and leaving his area of the country for a period of about four weeks during which time he will visit his former home in Oklahoma City. Upon his return he will again report to this office for evaluation of his back.

"Examination at this time, does not reveal the patient to be completely disabled for work. The general condition is good. He stands erect. There is some increase in the normal lumbar lordosis. The shoulders and pelvis are level. The spine is straight. The back musculature is well developed.

There is an area of tenderness well localized to the interspinous area over the upper portion of the sacrum. The patient is able to flex his spine bringing his fingertips to the floor. Right lateral bending causes aggravation of his discomfort in the lower portion of his back. The other motions are performed in a satisfactory manner without significant complaint. Extension also causes some discomfort.

"It seems quite probable that with a month's vacation this patient will secure considerable rest and this may help in the alleviation of his back discomfort. I do not believe that any permanent disability has been sustained and that treatment must be carried on along on asymptomatic basis with the hope that the back discomfort will eventually disappear. If and when this patient is seen again, further reports will be submitted.

"/s/ V. C. STEHR, M. D."

EXHIBIT "D"

Copy of report of Dr. Paul L. Jones, July 19, 1948:

"Mr. Curnutt reported to this office July 19, 1948, after a month's vacation. He did no heavy work and continued with his exercises. The total result is now Mr. Curnutt does not have as much pain during the night but his over all condition is approximately the same. His condition is apparently at this time static and since his re-entry of the office in January, 1948, he has had a rather rigorous course of treatment including injections, continu-

ous diathermy, his desages of Vitamin B,I.M., exercises for his back, wearing of a lumbo-sacral belt, and finally stretchng of his back under anesthesia by Doctor Stehr of Oakland.

"In view of the fact there has been no definite marked relief, I do not see why we should continue the therapy in this case. We will consider this letter as the final one and close our files on this case. I am going to refer Mr. Curnutt back to Doctor Stehr for a final evaluation concerning his back injury.

"/s/ PAUL L. JONES, M. D."

EXHIBIT "E"

Copy of excerpt from report of Dr. V. C. Stehr, Oct. 28, 1948:

"* * * The clinical impression has been that of a chronic interspinous ligamentous sprain between the spinous of the 5th lumbar and 1st sacral segments. Inasmuch as there has been no admitted improvement in the condition of his back during the past year, I think it would be wise at this time to have the patient examined by some other orthopedist of your choosing for a new opinion as to his disability.

"/s/ V. C. STEHR, MD."

EXHIBIT "F"

Copy of excerpt from report of Dr. Geo. J. McChesney, Nov. 26, 1948:

"* * * Opinion: I can find nothing more than a chronic arthritis or possibly fibrositis of the lower-

most interspinous ligament as suggested by Dr. Stehr. Injections give temporary relief only. The symptoms are not really serious and I see no reason why he should not be able to resume work if he is provided with a sacro-iliac belt. The type he described, in my opinion, would not help him and has not been worn for over six months. He says he can get a job any time but he is afraid to work as the last job he had for a private firm was harder than usual. The doctor for his stomach ulcers has given his okey for return to work, according to the patient. I see no indication for any further treatment other than application of a belt. There should be complete recovery with no disability. If there is prolongation of symptoms, alleged inability to work, his focal infections should be gone into, especially as regards his tonsils and sinus condition.

"/s/ GEO. J. McCHESNEY, M. D."

EXHIBIT "G"

Not copied. Irrelevant except for date stamp on back which reads, "Receved Mar. 10, 1947, John H. Black."

EXHIBIT "H"

Copy of statement on letterhead of Dr. Donald Dyer Lum and Dr. Paul L. Jones:

(Wages paid, no time lost.)

1947

2/20/47—Back injected with procaine and strapped.

2/24/48—Diathermy to back.

2/28/48—Diathermy to back.

3/ 6/48—Diathermy to back.

1948

1/16/48—Complete physical exam.

2/ 2/48—Diathermy to back.

2/ 5/48—Diathermy to back.

2/17/48—Diathermy to back.

2/24/48—Diathermy to back.

3/ 1/48—Diathermy to back.

3/ 8/48—Diathermy to back.

3/15/48—Diathermy to back.

3/22/48—Diathermy to back.

3/26/48—Diathermy to back.

3/31/48—Diathermy to back.

4/ 2/48—Diathermy to back.

4/ 5/48—Diathermy to back.

4/ 9/48—Diathermy to back.

4/12/48—Diathermy to back.

4/16/48—Diathermy to back.

4/30/48—Diathermy to back.

5/ 7/48—Diathermy to back.

5/15/48—Diathermy to back.

5/22/48—Diathermy to back.

5/28/48—Diathermy to back

6/ 3/48—Diathermy to back.

6/18/48—Diathermy to back.

7/19/48—Diathermy to back.

EXHIBIT "I"

Copy of statement on letterhead of William F. Holcomb, M. D., and Vernon C. Stehr, M. D.:

1948

4/26/48—Exam.

6/11/48—Back mani.

6/17/48—ov.

7/20/48—ov.

8/ 6/48—ov.

8/19/48—Back inj.

8/21/48—ov.

8/28/48—ov.

9/11/48—ov.

9/25/48—ov.

9/27/48—Back inj.

10/ 6/48—ov.

10/21/48—ov.

11/ 8/48—ov.

[Endorsed]: Filed February 10, 1949.

[Title of District Court and Cause.]

**CERTIFICATE OF CLERK TO RECORD
ON APPEAL**

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Complaint for Injunction Pursuant to Title 33, U.S.C.A. Section 921.

Motion to Dismiss.

Notice of Appeal.

Statement of Points on Which Appellant Intends to Rely and Designation of Parts of the Record Necessary for the Consideration Thereof.

Deputy Commissioner's Certification of Copies of the Pleadings, Transcript of Testimony, Exhibits (A, B, C, D, E, F, G, H and I) and Decision.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 10th day of August, A.D. 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12645. United States Court of Appeals for the Ninth Circuit. Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act, Appellant, vs. United Engineering Company, a Corporation, and Fireman's Fund Insurance Company, a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: August 9, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for
the Ninth Circuit

No. 12645

WARREN H. PILLSBURY, Deputy Commis-
sioner, etc.,

Appellant,

vs.

UNITED ENGINEERING COMPANY, a Corpo-
ration, et al.,

Appellees.

**STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY AND DES-
IGNATION OF PARTS OF THE RECORD
NECESSARY FOR THE CONSIDERA-
TION THEREOF**

Appellant states that he intends to rely upon the following points on appeal:

1. That the District Court erred in failing to give finality to findings of fact of the deputy commissioner supported by evidence.

2. That the District Court erred in reevaluating the evidence before the deputy commissioner, and in making different fact conclusions from those found by the deputy commissioner.

3. That the District Court misconstrued the law as to when the time for filing claim for compensation begins to run.

4. That the District Court erred in denying the motion to dismiss the complaint and in setting aside the compensation order complained of.

5. Appellant designates the following parts of the Record as necessary for consideration of the above points.

1. Complaint.

2. Defendant's motion to dismiss complaint.

3. Opinion-order of the United States District Court dated May 10, 1950, and filed on May 11, 1950, and order and decree dated May 11, 1950, denying the motion of defendant to dismiss the complaint and vacating and setting aside the order of the defendant awarding compensation.

4. The transcript of testimony taken at the hearing before the deputy commissioner on January 31, 1949, together with the exhibits which were copied into said transcript at the end thereof.

5. Notice of appeal.

6. This notice.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ MACKLIN FLEMING,
Assistant U. S. Attorney.
Attorneys for Appellant.

[Endorsed]: Filed August 18, 1950.

[Title of Court of Appeals and Cause.]

**MOTION FOR CONSOLIDATION FOR
BRIEFING AND ARGUMENT**

In the above-entitled causes, appellant hereby moves for the consolidation thereof for purposes of briefing and argument in this court, the grounds for the motion being the existence of a common question of law pertinent to each of these causes, and a common opinion of the District Court covering the common point of law herein.

Dated August 28, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ MACKLIN FLEMING,
Assistant U. S. Attorney.
Attorneys for Appellant.

We join in the above motion.

Dated Aug. 28, 1950.

/s/ JOHN H. BLACK,

/s/ EDWARD R. KAY,

Attorneys for Appellees.

United Engineering Company, etc.

67

In the United States Court of Appeals for
the Ninth Circuit.

ORDER OF CONSOLIDATION

The above-entitled causes are hereby consolidated
for purposes of briefing and argument in this court.

Dated Aug. 28, 1950.

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ CLIFTON MATHEWS,
Circuit Judge.

/s/ WM. E. ORR,
Circuit Judge.

[Endorsed]: Filed August 30, 1950.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12645

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIR-
TEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S
AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION AND FIREMAN'S
FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

Appeal from the United States District Court for the Northern
District of California, Southern Division

PROCEEDINGS. HAD IN THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

Excerpt from Proceedings of Wednesday, February 21, 1951

Before HEALY, BONE and ORR, *Circuit Judges*.

ORDER OF SUBMISSION

Ordered appeals herein argued by Mr. Reynold Colvin, Assistant
United States Attorney, counsel for appellants, and by Mr. Ed Kay,
counsel for appellees, and submitted to the court for consideration
and decision.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

Excerpt from Proceedings of Wednesday, March 14, 1951

Before HEALY, BONE and ORR, *Circuit Judges*.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING
OF JUDGMENTS

ORDERED that the typewritten opinion this day rendered by this
court in above causes be forthwith filed by the clerk, and that a
judgment be filed in each cause and recorded in the minutes of this
court in accordance with the opinion rendered.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12,644

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

No. 12,645

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

No. 12,646

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

MATSON TERMINALS, INC., A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

No. 12,647

Mar. 14, 1951

ALBERT J. CYR, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

Appeals from the United States District Court, Northern District of California, Southern Division

Before HEALY, BONE, and ORR, *Circuit Judges*.

HEALY, *Circuit Judge*.

Involved here are consolidated cases, four in number, arising under the Longshoremen's and Harbor Workers' Compensation

Act, 33 USCA §§ 901 et seq. In each case the Deputy Commissioner found a partial disability growing out of injury suffered in the course of employment. In one instance (the Shallat case) the award was for permanent and in the others for temporary disability. On appropriate proceedings before the district court the awards were annulled on the ground that the claims were barred because not filed within one year after the injury as provided in § 13(a) of the Act, 92 F. Supp. 898. The Deputy Commissioner appeals.

In each case the claimant suffered a specific injury from accident on a particular date. No latent injury or occupational disease is involved. There were no voluntary payments of compensation. The claims were filed on dates ranging from 18 to 23 months after the injury. Omitting for the moment what we regard as irrelevant or argumentative matters, the Deputy Commissioner's findings were these:

No. 12,644. Claimant Johnson on May 12, 1947, struck his head on a crossbeam of a vessel while working as a welder, "sustaining extensive strain of the muscles of the neck which still continues painful." His employer continued him in lighter work in a partially disabled condition without reduction in wages until May 15, 1948. He lost no time from work as a result of the injury until about June 15, 1948. Throughout the period in question he was furnished by his employer with medical treatment. His claim for compensation was filed January 17, 1949.

No. 12,645. Claimant Curnutt, on the 18th of February, 1947, while performing services as a sheet-metal worker in ship repair operations sustained personal injury resulting in disability as follows: While lifting a heavy object, he wrenched his back. He was disabled from work for six days, after which he was continued in lighter work at full wages until his employment was terminated January 13, 1948. He did not lose wages in excess of seven days until February 5, 1948. His claim for compensation was filed January 17, 1949. Medical treatment was furnished him by the employer throughout the period.

No. 12,646. Claimant Shallat on November 21, 1947, while performing services as a longshoreman on a vessel sustained personal injury resulting in disability as follows: He caught his left hand between a sling and a bight, causing a contusion of the left hand, and exacerbation of a pre-existing progressive arthritis of the proximal joint of the second or middle finger. Apparently he lost no time because of the injury and continued at work. It does not appear from the findings whether he received medical treatment at the expense of his employer. His claim for compensation was filed May 23, 1949.

No. 12,647. Claimant Manos on December 22, 1947, while performing services as a welder in the repair of a ship, sustained personal injury resulting in disability when he was struck on top of the head by an iron bar falling from above, suffering strain of the musculature in the cervical region. Following the injury he continued at his regular occupation as a welder without loss of time or wages until January 31, 1949, at which time, because of the condition of his neck, he was forced to discontinue working as a welder and seek other and lighter employment. Throughout the employer furnished him with medical treatment. His claim for compensation was filed August 17, 1949.

The material portion of § 13(a) of the Act reads: "The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, . . . except that if payment of compensation has been made without an award on account of such injury . . . a claim may be filed within one year after the date of the last payment . . ."

The Commissioner argues that the word "injury" should be construed as meaning "compensable injury." This, he says, has been the practical administrative construction of the term for a long time. He says that the interpretation is "consistent" with § 19(a), providing that a claim for compensation "may be filed . . . at any time after the first seven days of disability," and with § 6(a) providing that "no compensation shall be allowed for the first seven days of the disability . . ." He adds that unless the interpretation meets with judicial approval his office will be flooded with a load of unnecessary claims.

We may observe, in passing that the injured men appear to have suffered a disability of greater or less extent from the outset. Two of them, at least, as the Commissioner found, had to be put on lighter work, and all of them confessedly continued from the time of injury to suffer pain and discomfort from it. It is true they lost no time, or none in excess of seven days anyway, and were paid their old wage, but those facts alone do not spell absence of disability for which an award may be made. See *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 9 Cir., 103 F. 2d 513, where this court sustained an award under like circumstances, saying that wages received by a worker who has suffered an injury are not conclusive and that ability to earn is the test.

But we do not, as the trial court did, rest decision on the *Twin Harbor* holding. What the Commissioner's argument really amounts to is that the statute begins to run, not from the date of the injury, but from the date of disability. The view appears irreconcilable with the plain terms of the Act. The argument necessarily assumes that the terms "injury" and "disability" are interchangeable. However, as we pointed out in *Kobilkin v. Pills-*

bury, 103 F. 2d 667, 669, the terms are separately defined in the statute and are not synonymous. Section 2(2) states that when used in the Act "the term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, . . ." In the same section (subdivision 10) "disability" is defined as meaning "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment."

In the *Kobilkin* case, *supra*, the claimant was disabled from work for a period of three weeks following his injury, for the allowable portion of which time compensation was voluntarily paid him. He then resumed his employment at the former wage and continued to work for 17 months, when his condition worsened and it was learned that his injury was more extensive than had originally been thought. Later he filed a claim. Deputy Commissioner Pillsbury disallowed it because not filed within one year from the last payment of compensation as provided in § 13(a). We upheld the ruling and the Supreme Court affirmed without opinion, 309 U.S. 619.¹ Answering an argument somewhat analogous to the one made here, we said that the injury "was inflicted at the time of the accident, not when its full extent was first noted at the later time."

The Commissioner endeavors to distinguish the holding on the ground that *Kobilkin* was off work for more than seven days in consequence of the injury and was appropriately paid compensation. If the distinction were accepted as of controlling significance a startling result would ensue, as will be seen from the following illustration: Worker A is disabled from work for eight days following his injury, and is accordingly paid compensation for the eighth day. If he fails to file a claim within a year after the payment he is forever barred. Worker B is disabled from work for but six days or less after injury, and in line with § 6(a), *supra*, is paid no compensation. According to the argument there is no time limit within which B may file a claim.

As the language of § 13(a) evidences, Congress was not unaware that there would be many cases like B's and it deliberately provided that the right to compensation in such cases would be

¹ The *Kobilkin* case, unlike the present, may be thought to have involved a latent or undiscovered injury. It is arguable that in such cases the injury should be treated as arising when its true nature is discovered. Possibly this circumstance accounts for the four to four division among the justices when the case was disposed of in the Supreme Court.

some barred unless claim therefor is filed within one year after the injury. If it is thought desirable in the interest of justice or practical administration that a different limitation be prescribed, the power to effect the change resides in Congress, not in the courts.

The decrees of the district court in the several cases are affirmed.

(Endorsed:) Opinion. Filed Mar. 14, 1951 Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12645

WARREN H. PILLSBURY, ETC., APPELLANT

vs.

UNITED ENGINEERING COMPANY, ET AL., APPELLEES

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On consideration whertof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

(Endorsed:) Filed and entered March 14, 1951. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12645

WARREN H. PILLSBURY, ETC., APPELLANT

vs.

UNITED ENGINEERING COMPANY, ET AL., APPELLEES

Certificate of Clerk, U. S. Court of Appeals for the Ninth Circuit, To Record Certified under Rule 38 of the Revised Rules of the Supreme Court of the United States.

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing seventy-five (75) pages, numbered from and including 1 to and including 75, to

be a full, true and correct copy of the entire record of the above-entitled case in the said Court of Appeals, made pursuant to request of Hon. Philip B. Perlman, Solicitor General of the United States, counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 4th day of June, 1951. [SEAL.]

(S.) PAUL P. O'BRIEN,

Clerk.

In the Supreme Court of the United States

No. — October Term, 1951

WARREN H. PILLSBURY, DEPUTY COMMISSIONER, PETITIONER

vs.

UNITED ENGINEERING COMPANY, ET AL. (HOWARD JOHNSON
INJURY)

WARREN H. PILLSBURY, DEPUTY COMMISSIONER, PETITIONER

vs.

UNITED ENGINEERING COMPANY, ET AL. (FRANK S. CURNETT
INJURY)

WARREN H. PILLSBURY, DEPUTY COMMISSIONER, PETITIONER

vs.

MATSON TERMINALS, INC., ET AL. (LOUIS SHALLAT INJURY)

ALBERT J. CYR, DEPUTY COMMISSIONER, PETITIONER

vs.

UNITED ENGINEERING COMPANY, ET AL. (CHRIS MANOS INJURY)

Upon consideration of the application of counsel for the petitioners,

It is ordered that the time for filing petition for certiorari in the above-entitled causes be, and the same is hereby, extended to and including 11th day of August 1951.

HUGO L. BLACK,
*Associate Justice of the Supreme
Court of the United States.*

Supreme Court of the United States

No. 229, October Term, 1951

[Title omitted.]

Order allowing certiorari

(Filed October 15, 1951)

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

VOLUME

III



Volume III

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 229

WARREN H. PILLSBURY AND ALBERT J. CYR, DEPUTY
COMMISSIONERS FOR THE THIRTEENTH COMPEN-
SATION DISTRICT, ETC., PETITIONERS

UNITED ENGINEERING COMPANY, A CORPORATION
FIREMEN'S FUND INSURANCE COMPANY, ET AL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 3, 1951
CERTIORARI GRANTED OCTOBER 13, 1951

INDEX

	Page
Record from U. S. D. C. for the Northern District of California, Southern Division:	
Complaint for injunction.....	2
Motion to dismiss bill.....	11
Opinion, Goodman, J.....	14
Order and decree.....	21
Notice of appeal.....	22
Transcript of testimony at hearing.....	23
Testimony of Louis Shallat.....	26
Exhibit "A"—Copy of excerpt from report of Dr. G. D. Delprat.....	32
Exhibit "B"—Copy of excerpt from report of Dr. C. F. Burton.....	33
Exhibit "C"—Copy of report of Dr. G. D. Delprat.....	35
Clerk's certificate.....	35
Statement of points to be relied upon and designation of parts of record to be printed.....	37
Proceedings in U. S. C. A. for the Ninth Circuit:	
Motion for consolidation for briefing and argument.....	39
Order of consolidation.....	40
Order of submission.....	41
Order directing filing of opinion and filing and recording of judgments.....	41
Opinion, Healy, J.....	42
Judgment.....	46
Clerk's certificate.....	46
Order extending time to file petition for writ of certiorari.....	49
Order allowing certiorari.....	51

No. 12646

**United States
Court of Appeals**
for the Ninth Circuit.

WARREN H. PILLSBURY, Deputy Commissioner for the Thirteenth Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act,

Appellant,

vs.

MATSON TERMINALS, INC., a Corporation, and
FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Appellees.

Transcript of Record

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**

NAMES AND ADDRESSES OF ATTORNEYS.

FRANK J. HENNESSY,

United States Attorney.

EDGAR R. BONSALE,

Assistant United States Attorney,

Post Office Building,

San Francisco, California.

Attorneys for Defendants and Appellant.

JOHN H. BLACK,

EDWARD R. KAY,

233 Sansome Street,

San Francisco, California.

Attorneys for Plaintiffs and Appellees.

In the Southern Division of the United States District Court for the Northern District of California

No. 29058R

MATSON TERMINALS, INC., a Corporation,
FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Plaintiffs,

vs.

WARREN H. PILLSBURY, Deputy Commissioner for the Thirteenth Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act,

Defendant.

COMPLAINT FOR INJUNCTION PURSUANT
TO TITLE 33, U.S.C.A. SECTION 921

To the Honorable District Court of the United States, Northern District of California, Southern Division:

The plaintiffs, Matson Terminals, Inc., a corporation, and Fireman's Fund Insurance Company, a corporation, respectfully show:

I.

Plaintiff, Matson Terminals, Inc., at all times herein mentioned has been and now is a corporation; Plaintiff Fireman's Fund Insurance Company, at all times herein mentioned has been and now is a

corporation. Both of said corporations have their principal offices in the City and County of San Francisco, State of California.

II.

That plaintiff Fireman's Fund Insurance Company, a corporation, at all time herein mentioned, was the Longshoremen's and Harbor Workers' Compensation insurance carrier for said Matson Terminals, Inc., a corporation.

III.

On the 21st day of November, 1947, one, Louis Shallat, was in the employ of the said Matson Terminals, Inc., as a longshoreman and on said date was working as such longshoreman aboard the SS "Mauna Loa" on navigable waters of the United States at San Francisco Harbor, California.

IV.

On said date and at said place, the said Louis Shallat suffered an injury to his left hand while employed as aforesaid.

V.

That thereafter on November 24 and 25, 1947, plaintiffs herein provided medical treatment to the said Louis Shallat for the said injury. That the said Louis Shallat thereafter sought no further medical treatment until the 4th day of April, 1949, following which plaintiffs provided further medical treatment during the months of April and May, 1949.

VI.

That the plaintiff Matson Terminals, Inc., duly filed with defendant on February 16, 1948, a report covering said injury in accordance with Section 30 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 930.

VII.

That no compensation payments were ever made to the said Louis Shallat, or promised by said plaintiffs, or either of them.

VIII.

That on the 23rd day of May, 1949, a claim for compensation was filed with the defendant Deputy Commissioner by the said Louis Shallat, alleging that he had sustained certain disability to his left hand as the result of said injury of November 21, 1947.

IX.

On July 28, 1949, defendant made and entered a compensation order awarding compensation payment to the said Louis Shallat, as follows:

Federal Security Agency
Bureau of Employees Compensation
13th Compensation District
Case No. 716-864, Claim No. 3242

In the Matter of the Claim for Compensation Under
the Longshoremen's and Harbor Workers'
Compensation Act

LOUIS SHALLAT,

Claimant,

against

MATSON TERMINALS, INC.,

Employer,

FIREMAN'S FUND INSURANCE COMPANY,
Insurance Carrier.

COMPENSATION ORDER—AWARD OF
COMPENSATION

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

Findings of Fact

That on the 21st day of November, 1947, the claimant above-named was in the employ of the employer above named at San Francisco Harbor, in the State of California, in the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Fireman's Fund Insurance Company; that on said day

claimant herein while performing service for the employer as a longshoreman and engaged in stevedoring operations on a vessel upon navigable waters of the United States at said harbor sustained personal injury arising out of and in the course of his employment and resulting in disability as follows: He caught his left hand between a sling and a bight, causing a contusion of the left hand and exacerbation of a pre-existing progressive arthritis of the proximal joint of the second or middle finger; that the employer furnished claimant with medical treatment, etc., in accordance with Section 7(a) of the said Act; that the average weekly earnings of the claimant herein at the time of his injury amounted to the sum of \$90.00; that claimant did not sustain at said time any sufficient injury to the right hand to be a cause of any disability therein; that no compensation has been paid; that the claim for compensation was filed on May 23rd, 1949, the employer's first report was filed in the office of the Deputy Commissioner on February 16th, 1948, that by reason of the absence of any temporary disability claimant did not become entitled to any compensation payments for which he could make claim until the condition of his left second finger reached a permanent stage and became a permanent disability, that said permanent disability became fixed within one year prior to the filing of the claim and the claim is not barred by limitations; that by reason of his injury claimant has sustained permanent disability amounting to loss of 50% of the use of his finger

end entitling him to compensation for 9 weeks at \$25.00 a week, amounting to \$225.00, no part of which has been paid; that claimant's physician, Dr. V. C. Stehr, has rendered service to claimant in the prosecution of his claim consisting in examination and filing of a report for use as evidence herein, that a fee is charged and approved therefor in the sum of \$25.00, and lien granted therefore upon compensation herein awarded claimant.

Upon the foregoing facts the Deputy Commissioner makes the following:

Award

That the employer, Matson Terminals, Inc., and the insurance carrier, Fireman's Fund Insurance Company, shall pay to the claimant compensation as follows:

To claimant the sum of \$225.00 forthwith, less however the sum of \$25.00 to be deducted therefrom and paid to claimant's physician, Dr. V. C. Stehr, upon his lien for fee for examination and report.

Given under my hand at San Francisco, California, this 28th day of July, 1949.

WARREN H. PILLSBURY,

Deputy Commissioner,

13th Compensation District.

X.

That the evidence in the hearing before the said defendant is without conflict that the said Louis Shallat sustained injury on the 21st day of Novem-

ber, 1947, that he received medical treatments therefor and that no compensation payments were made or promised to the said Louis Shallat by the plaintiffs, or either of them.

XI.

That no claim for compensation was filed with the Deputy Commissioner by or on behalf of the said Louis Shallat until more than one year after the injury of November 21, 1947, to wit: May 23, 1949.

XII.

That prior to the first hearing on said claim, plaintiffs pleaded that said claim was barred by the period of limitations prescribed by the said Long shoremen's and Harbor Workers' Compensation Act.

XIII.

That by the said Compensation Order of July 28, 1949, the plaintiffs herein are ordered to pay to the said Louis Shallat the sum of \$225.00, less the sum of \$25.00 payable to the said Shallat's physician upon his lien for fee for examination and report.

XIV.

Plaintiffs are informed and believe, and upon such information and belief, allege that the said Louis Shallat, claimant in the said proceedings before the defendant Deputy Commissioner, to whom compensation payments are ordered to be paid as aforesaid, is a person of no financial means and

without property, and if plaintiffs should pay to him the sum awarded in said Compensation Order, they could not be recovered back and that accordingly plaintiffs will suffer great and irreparable damage and injury if said award and order is not stayed.

XV.

Plaintiffs are informed and believe that an early date for a hearing on the merits of this matter can be had before this Honorable Court.

XVI.

Plaintiffs believe that there is a great probability that the said Compensation Order of the defendant will be set aside by this Court on the ground that said defendant had no jurisdiction to issue such Order in view of the uncontradicted evidence that the said claim was filed more than one year after the date of said injury.

Wherefore, plaintiffs pray that said Compensation Order and Award be set aside and the same and its enforcement be permanently enjoined and restrained; that in addition said compensation order may be suspended and that an order be entered for an interlocutory injunction suspending the same during the pendency of this action; that payments required by said order and award and each of them be stayed until final decision herein; and that this Court may find and adjudge that the said claim for compensation was filed more than one year after the said injury and that, therefore, the said Louis

Shallat's right to compensation, under the provisions of the Longshoremen's and Harbor Workers' Compensation Act is barred; and that plaintiffs should not be, nor is either of them subject to or liable to pay compensation because of the said injury to the said Louis Shallat; and that said claim is not within the jurisdiction or power of defendant to administer or apply as against either plaintiff; and for such other and further relief as to the Court may seem just.

/s/ JOHN H. BLACK,

/s/ EDW. R. KAY,

Attorneys for Plaintiffs Matson Terminals, Inc.,
and Fireman's Fund Insurance Company.

United States of America,
Northern District of California,
City and County of San Francisco—ss.

G. E. Libby, being first duly sworn, deposes and says:

That he is one of the officers, to wit, Assistant Marine Secretary of the Fireman's Fund Insurance Company, a corporation, one of the plaintiffs herein; that he has read the foregoing Complaint for Injunction Pursuant to Title 33, U.S.C.A. Section 921, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters set forth therein upon information

and belief, and as to these matters he believes it to be true.

/s/ G. E. LIBBY.

Subscribed and sworn to before me this 9th day of August, 1949.

[Seal] /s/ LAURA L. MacHUGH,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires January 15, 1952.

[Endorsed]: Filed August 10, 1949.

[Title of District Court and Cause.]

MOTION OF DEFENDANT, WARREN H. PILLSBURY, DEPUTY COMMISSIONER, TO DISMISS BILL OF COMPLAINT

Now comes the defendant, Warren H. Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission, for the 13th Compensation District, by his attorney, Frank J. Hennessy, United States Attorney for the Northern District of California, and moves this Honorable Court to dismiss the Bill of Complaint after review of the Compensation Order filed herein for the following reasons:

1. That the Bill of Complaint filed herein does not state a cause of action and does not entitle plaintiffs to any relief, nor does said Bill of Complaint state a claim against the defendant, Warren H. Pillsbury, Deputy Commissioner, upon which relief can be granted;

2. That it appears from the Bill of Complaint, including the Transcripts of Testimony taken before the Deputy Commissioner on file herein, that the findings of fact of the Deputy Commissioner, in the compensation order filed by him on September 3, 1948, complained of in the Bill of Complaint, were supported by evidence and under the law said findings of fact should be regarded as final and conclusive.

3. That it appears from the Bill of Complaint, including said Transcripts of Testimony, that said compensation order complained of herein is in all respects in accordance with law.

4. For such other good and sufficient reasons as may be shown.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ EDGAR R. BONSALE,

Assistant United States Attorney, Attorneys for
Defendant, Warren H. Pillsbury, Deputy Commissioner.

This motion will be based on transcript of the record of proceedings before defendant, Warren H. Pillsbury, deputy commissioner, 13th Compensation District, which said defendant intends to introduce in evidence as defendant's exhibit #1, and on the Points and Authorities submitted in connection with this case.

[Endorsed]: Filed November 28, 1949.

In the United States District Court for the Northern District of California, Southern Division

No. 29058

MATSON TERMINALS, INC., a Corporation, et al.,

Plaintiff,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, etc.,

Defendant.

Appearances:

JOHN H. BLACK,
EDWARD R. KAY,
233 Sansome Street,
San Francisco, California,
Attorneys for Plaintiffs.

FRANK J. HENNESSY,
United States Attorney.

EDGAR R. BONSALL,
Assistant United States Attorney.

MACKLIN FLEMING,
Assistant United States Attorney,
San Francisco, California.
Attorneys for Defendants.

OPINION

Goodman, District Judge.

In these four consolidated actions, the plaintiff employers and their respective insurance carriers have asked this court to set aside and enjoin the enforcement of Compensation Orders and Awards made by the Deputy Commissioner pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 USC 901-950. The question presented is whether the Deputy Commissioner lacked jurisdiction to make the awards because the claims for compensation were not filed within a year after the claimants were injured as is allegedly required by Section 13(a) of the Act. The Deputy Commissioner has moved to dismiss the complaints on the ground that the claims were timely filed and that therefore the awards were proper.

Section 13(a) of the Act provides that "The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefore is filed within one year after the death, except that if payment of compensation has been made, without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred." (Emphasis added.)

For a proper understanding of the issues presented, a brief account of the injuries suffered by

the claimants and the events leading up to the compensation awards is here necessary.

Claimant Howard Johnson on May 12, 1947, struck his head on a cross-beam of the vessel Monterey while working as a leaderman welder. The muscles of his neck were severely strained and he was unable to continue to weld aboard ship. His employer transferred him to lighter work in the machine shop at no reduction in wages. Although his neck continued to trouble him, he continued to work regularly for more than a year until he was discharged by the new owner of the ship yards because he was unable to weld aboard ship. Since that time he has been employed only intermittently because he is physically able to perform only the less strenuous types of welding operations. When Johnson first lost time from work, he was told it was too late for him to file a claim for compensation. But when he discovered how many employment opportunities were lost because of his condition, he decided to attempt to secure compensation. On January 31, 1949, more than a year and a half after the accident, he filed his claim with the Deputy Commissioner.

Claimant Frank Curnutt on February 17, 1947, while employed as a sheetmetal worker aboard the S. S. Lurline, wrenched his back when he lifted a pre-heater from the deck to a table. He did not work for several days. When he returned to his job, he was relieved of all heavy work on doctor's orders. With some discomfort, he performed lighter duties at his former wage rate until his job ended

in about a year. After resting for two weeks to give his back a chance to heal, he obtained work with the Bethlehem Steel Company. In June of 1948, he quit work for five weeks, as a therapeutic measure suggested by his physician. In July he went to work for a sheet-metal company, but soon was forced to give up this job, and subsequent ones, because the work proved too strenuous. On January 17, 1949, nearly two years after injuring his back, Curnutt filed his claim for compensation.

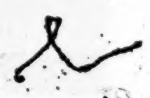
Claimant Louis Shallat on November 21, 1947, while working as a stevedore aboard the S. S. Mauna Lei, caught his hands between a sling and a bight. Considerable pain and swelling in his hands resulted. According to Shallat, his left hand has pained him continuously since it was injured and he has applied self-treatment. While he testified at the hearing before the Deputy Commissioner that the injury grew "more and more severe," he also stated that "the left hand is still the same as it was when I got injured." Shallat had lost no time from work up to the date of the final hearing before the Deputy Commissioner. At that hearing, Shallat stated that he did not file his claim for compensation until May 23, 1949, nearly a year and a half after he was injured, because he thought the injury "wasn't so serious," and that "it would work its way out."

Claimant Chris Manos was welding on the deck of the tanker Purisima on December 22, 1947, when he was struck on the head by an iron saddle falling from above. He was instructed by the examining

physician not to weld thereafter, and consequently was given lighter work by his employer. He suffered no reduction in rating or wages. About two months later his employment terminated as a result of a general reduction in the number of men employed at the ship yard. In a week or so he obtained a shop welding job at a slightly higher wage than he had previously received at the ship yard. This job ended in January of 1949, due to a general lay off. At the time of the hearing before Deputy Commissioner on August 29, 1949, Manos was still unemployed, but was planning to engage in sales work. Manos' neck has troubled him continually since he was struck on the head and he has received regular medical treatment. In some respects the condition of his neck apparently gradually has improved and in others it has grown worse. Manos filed a claim for compensation on August 17, 1949, more than a year and a half after he was injured.

The Deputy Commissioner justified his awards to these claimants and now grounds his motion to dismiss these complaints on his conclusion that Section 13(a) of the Compensation Act sets the one-year period of limitation running, not from the date of injury, but from the date on which the injury became compensable. There may be merit to this interpretation of Section 13(a) but these causes can be determined without reaching the question.

In my opinion, the Deputy Commissioner erred in assuming that the injuries suffered by these claimants were not compensable so long as they con-



tinued to work with no reduction in wages. It is now settled law in this Circuit that a claimant is not precluded from recovering compensation under the Act because he has been paid his old wages at all times since resuming work after being injured. *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 103 F.2d 513 (1939). Accord, *Luckenbach S. S. Co. v. Norton*, 96 F.2d 764 (3 Cir. 1938); *Hartford Accident and Indemnity Co. v. Hoage*, 85 F. 2d 420 (App. D. C. 1936). The Act says nothing about "compensable injuries" but only provides that compensation must be paid for disability. Disability is defined by Section 2(10) as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." The statute makes earning capacity the test. Earning capacity may be properly defined to mean ability to earn, rather than wages actually received. And this means ability to earn in the open labor market, not ability to secure exceptional consideration from a sympathetic employer.

Although their employers did not reduce their wages, claimants Johnson, Curnutt, and Manos were physically unable, following their injuries, to perform the same duties they had previously performed. Pain and suffering were continuous. They were well aware that unless there was improvement in their physical condition, they would be unable to again engage in strenuous activity. Claimant Manos admitted that he was told by the physician, who examined him following his injury, that he could obtain compensation. Instead of doing so, at the same physician's suggestion, he sought and ob-

tained from his employer lighter work at his former wages.

Claimant Shallat apparently continued to perform the same duties following his injury as he had before. But, if his statements to examining physicians are accepted as true, he was in constant pain. The Compensation Act does not deny relief to an injured workman until his pain exceeds endurance.

All four of the present claimants have been disabled within the meaning of the Longshoremen's and Harbor Workers' Compensation Act since the day they were injured. Consequently they had compensable claims.¹ Such claims were not timely filed. It follows that the awards of the Deputy Commissioner were not within his power to make. The court is aware of the well established rule that the Deputy Commissioner's findings of fact should not be disturbed if there is any substantial evidence to support them. But his conclusion that these claimants suffered no disability until long after they were injured is based on an error of law. The undisputed factual record shows that the earning capacity of these men was impaired from the time of injury.

The delay in the filing of these claims is wholly understandable. None of these claimants appear to have been fully aware of his rights and obligations under the Compensation Act. And, even had these men realized the consequences of delay, it is only natural that they should hesitate to jeopardize their

¹See *Liberty Mutual Insurance Co. v. Parker*, 19 F. Supp. 686 (Md. 1937) in which the same conclusion was reached on somewhat similar facts.

opportunity to continue working at their former wage rate by pressing claims for compensation. In a relatively short time the wages of these claimants would have equaled the maximum awards they could ever hope to receive. These, however, are considerations for the lawmakers and not for the Courts.

The motions to dismiss are denied and the awards are severally set aside and vacated.²

Dated May 10, 1950.

[Endorsed]: Filed May 11, 1950.

²The above order in fact fits the issues raised by the pleadings. But in order to technically comply with the rule announced by our Court of Appeals in *Twin Harbor Stevedoring & Tug Co. v. Marshall*, supra, the causes are transferred to the Admiralty docket, the motions will be treated as exceptions and are overruled and a decree will enter vacating and setting aside the awards.

In the United States District Court for the Northern District of California, Southern Division

No. 29058-Civil

MATSON TERMINALS, INC., a corporation,
et al.,

Plaintiff,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, etc.,

Defendant.

ORDER AND DECREE

In the above-entitled case the motion to dismiss is denied and the award is severally set aside and vacated.

It is further ordered that the above-entitled case is transferred to the Admiralty docket, the motion will be treated as exception and is overruled and a decree is hereby entered vacating and setting aside the award.

Dated at San Francisco, California, this 11th day of May, 1950.

/s/ LOUIS E. GOODMAN,

United States District Judge.

(As amended by order of August 23, 1950.)

[Endorsed]: Filed May 11, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, defendant in the above-entitled action, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final order of this Court filed on May 11, 1950, denying the motion of the defendant to dismiss the complaint and vacating and setting aside the order of the defendant awarding compensation dated July 28, 1949.

Dated: July 3, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ EDGAR R. BONSALE,
Assistant U. S. Attorney.
Attorneys for Defendant.

[Endorsed]: Filed July 3, 1950.

United States Federal Security Agency
Bureau of Employees Compensation
Before Warren H. Pillsbury, Deputy Commissioner
13th Compensation District

Case No. 716-864, Claim No.

LOUIS SHALLAT,

Claimant,

vs.

MATSON TERMINALS, INC.,

Employer,

FIREMAN'S FUND INSURANCE CO.,

Insurance Carrier.

TRANSCRIPT OF TESTIMONY
AT HEARING

May 23, 1949

Pursuant to notice, this matter was heard before Warren H. Pillsbury, Deputy Commissioner, Bureau of Employees Compensation, at the Coroner's Court, at 480 Fourth Street, Oakland, California, on Monday, the 23rd day of May, 1949, at 9 a.m.

Appearances:

Claimant present in person.

Defendants represented by F. W. Sexton, claims representative, appearing for B. W. Greenough.

Mr. Pillsbury: Hearing on claim for compensation. In this matter, claimant is claiming com-

compensation for an injury to the left hand and now to the right hand also from an injury of November 21, 1947. Two preliminary conferences have been held since receipt of claimant's letter of March 11, 1949, claiming compensation. As a result of the first conference, medical examinations were arranged, and as a result of the second conference, treatment was tendered and given for about six weeks. It appears today that claimant contends no further gain can be had from treatment, and requests a permanent disability rating for his hands. He agrees that he has not lost time from work to date as a result of the injury.

It appearing that formal claim has not yet been received, I have filled out such claim for claimant, which he has signed, and it is ordered filed. Stipulated that hearing may proceed immediately.

Mr. Sexton, what is defendant's position?

Mr. Sexton: We raise the issue of nature and extent of disability, liability for compensation, and we will also plead the statute of limitations inasmuch as the accident occurred November 21, 1947, and claim is being filed today, May 23, 1949.

Mr. Pillsbury:

The Following Facts Are Agreed to by the Parties:

1. That claimant Louis Shallat was in the employ of defendant Matson Terminals, Inc., at San Francisco Harbor, California, on and about November 21, 1947, as a longshoreman, and at said time said employer had secured the payments of compensation under the Longshoreman's and Har-

bor Workers' Compensation Act by insurance in defendant Fireman's Fund Insurance Company;

2. That claimant sustained an injury to his left hand on said date;

3. That at said time claimant was performing stevedoring service on a vessel on navigable waters of the United States, and the claim is within the provisions of said act and the jurisdiction of the Deputy Commissioner.

4. Medical treatment has been furnished by defendants.

5. Claimant's average earnings may be fixed for the purpose of this proceeding at \$90.00 a week at the time of said injury;

6. No compensation has been paid and claimant asserts he has not lost any time from work to the present time.

The Issues Are:

1. Whether claimant has sustained permanent disability as a result of said injury to either hand;

2. Whether his right hand was injured in said injury;

3. Whether the claim is barred by the period of limitations prescribed by said act.

Mr. Pillsbury: Any other issues?

Mr. Sexton: I think that covers it.

LOUIS SHALLAT

claimant, having been first duly sworn, testified as follows:

By Mr. Pillsbury:

Q. You are Louis Shallat? A. Yes.

Q. You live at 341 42nd Street, Oakland?

A. Yes.

Q. You sustained an injury, did you, on November 21, 1947? A. Yes.

Q. Did you hurt your left hand or both hands?

A. Both hands, but this is more severe (indicating left hand). The severity is on this hand.

Q. The left hand?

A. The left hand where the severe is.

Q. Did you say anything to the doctors about hurting your right hand at the same time?

A. Yes, I did.

Q. Do you know why they did not report any injury to the right hand? Did you ask for any treatment for the right hand? A. Yes, I did.

Q. Do you know why the doctor did not report it? A. It was not reported.

Q. Why not?

A. The only report was on the left hand.

Q. Why was that if the hurt was on both hands?

A. The reason why is because I mentioned the severity of the pain was on the left hand but not in the right. You have to work with both hands, but the hook caught me heavy on the left.

Q. What happened to your right hand?

(Testimony of Louis Shallat.)

A. Well, I was jammed in the bight when he went up.

Q. And were both hands caught in the bight?

A. Yes, both hands were caught.

Q. How is your left hand today?

A. The left hand is still the same as it was when I got injured.

Q. How is it?

A. The right hand?

Q. The left hand?

A. The left hand is the same.

Q. How does it feel today?

A. Terrific pains when I lift something. It goes right through me. It affects the whole hand, and lots of times I have to drop something, I cannot hold it with the left hand.

Q. How is your right hand today?

A. My right hand is far better than the left hand.

Q. How is it? How much does it bother you now?

A. Just around here (indicating). This hand bothers me to whole length (indicating left hand to shoulder).

Q. How much does your right hand bother you now?

A. It still bothers me very little, but not so severe as the left hand.

Q. I notice in the doctor's first report he says something about the X-ray showing a piece of metal in your left hand. Do you know when you got it?

A. No, it doesn't. I thought so, too. I went to

(Testimony of Louis Shallat.)

the Marine Terminals and through the X-rays it shows it, it did not show it in their X-rays. Way before this injury ever happened I took some slivers out of the gloves, handling big tanks, and through the X-rays I mentioned it bothered me this sliver, and they took the slivers out.

Q. Do you know of any time that you ever got some metal in the left hand?

A. No, I do not. I have no recollection of it.

Q. Why did you wait so long before filing a claim?

A. Well, I didn't make no notes of it. I didn't think it was serious. I did file a report of the injury immediately and he told me, the main walking boss, he says, "My God——"

Q. Wait a minute. The question is, why didn't you file a claim earlier?

A. You mean a claim for compensation?

A. Yes?

A. I thought it wasn't so serious. I thought it would work its way out. I took it upon my own. I thought it would gradually work itself out.

Q. I received a letter from you on March 11th of this year. Was that the first time you raised any question about it?

A. It was getting more and more severe.

Q. Was that the first time that you took up your injury?

A. Yes. It got to the point it was too severe for me and I couldn't figure out what should be done.

(Testimony of Louis Shallat.)

Mr. Pillsbury: Any questions, Mr. Sexton?

Q. (By Mr. Sexton): Mr. Shallat, you saw several doctors for treatment of your left hand, but you never mentioned your right hand, is that correct? You did not mention the injury to the right hand?

A. I did, but that the injury to the right wasn't as severe as the left.

Q. (By Mr. Pillsbury): What is the first time you had any treatment for the right hand?

A. I never got treatment.

Q. You have it painted now?

A. I put that there myself. It helps me out.

Q. You never had treatment for the right hand by a doctor?

A. No, but on the therapy I have been putting both hands in the whirlpool, the both hands in, so that both hands were getting the treatment.

Mr. Pillsbury: Go ahead, Mr. Sexton.

Q. (By Mr. Sexton): In this period from November, 1947, until March of 1949, over a year, about a year and a quarter, did you receive any treatment at all for your hand? Did you go to any doctor at all?

A. I was taking my own treatment.

Q. You were treating yourself or going to a doctor?

A. I was treating myself because you weren't paying for it. I was paying it out myself.

Q. Why didn't you file a claim for it?

A. I made the report out but I didn't think it serious. It is my own fault, to some extent. I will

(Testimony of Louis Shallat.)

admit that, because I thought it wasn't so serious until it gradually proved itself serious.

Q. (By Mr. Pillsbury): When did you go to your own doctor? A. I have no doctor.

Q. I thought you said you paid out money for your own doctor? A. I bought things.

Q. For medicine? A. Yes.

Q. Not for a doctor?

A. No, not for a doctor. I got a few things, like a violet ray.

Q. (By Mr. Sexton): You knew, however, did you not, that you were entitled to medical treatment? Working as a longshoreman, you knew you were entitled to medical treatment for injuries, did you not? A. What could you do?

Q. Didn't you know you were entitled to go to the doctor?

A. Perhaps I did. I didn't know whether the doctor could do me any good. I did go to Dr. Delprat. I went to him and here is what he told me. I raised the objection to him. He says, "You can try to go to work and see how your hand is." When I went down I almost killed myself going down in the hold and I fell.

Q. You didn't go back to him after that treatment? A. No, I did not.

Q. Didn't he ask you to come back again? He asked you to try it out?

A. No. I was so mad I never went back. I mentioned that here.

Mr. Sexton: That is all I have.

(Testimony of Louis Shallat.)

Mr. Pillsbury: I have the following medical reports which are exhibited for introduction in evidence:

Report of Dr. Delprat, November 25, 1947, surgeon's first report, received in evidence as Exhibit "A";

Report of Dr. C. F. Burton, April 5, 1949, Exhibit "B";

Report of Dr. Delprat, December 10, 1947, Exhibit "C";

Does either side have any other medical reports?

Mr. Sexton: You have the last one of Dr. Burton, I believe.

Mr. Pillsbury: Yes.

I will send claimant to U. S. Marine Hospital, San Francisco, for examination. Copy of report will be sent to each side, and case then submitted for decision unless within one week thereafter either side requests further proceedings.

REPORTER'S CERTIFICATE

I hereby certify that the foregoing is a correct transcript of the testimony and proceedings taken in the above matter at the hearing held on the 23rd day of May, 1949.

/s/ L. P. SMITH,
Reporter.

EXHIBIT "A"

Copy of excerpt from report of Dr. G. D. Delprat, Nov. 25, 1947:

"6. Date of accident: Nov. 21, 1947. Hour, 8:30 p.m.

"7. State in patient's own words where and how accident occurred: Caught left hand between sling and bight.

"8. Give accurate description of nature and extent of injury and state your objective findings: Contusion left hand, no break in skin, but moderate swelling back of hand.

"9. Will the injury result in (a) Permanent defect: No.

"10. Is accident above referred to the only cause of patient's condition? Yes.

"11. Is patient suffering from any disease of the heart, lungs, brain, kidneys, blood, vascular system or any other disabling condition not due to this accident?

"12. Has patient any physical impairment due to previous accident or disease? Give particulars. X-ray continued, there is a metallic fragment 1 mm. in diam. and 5 mm. in length lying near the base of the 2nd metacarpal. Nov. 24, 1947, in the office, sent for films, exam. advice.

"13. Has normal recovery been delayed for any reason?

"14. Date of your first treatment? Nov. 25, 1947. Who engaged your services? Employer.

"15. Describe treatment given by you: Again in office. Office advised his films are negative for injury, use hot soaks, etc.

"16. Were X-rays taken? Yes. By whom? C. C. Fulmer, 384 Post St., SF 8 When? 11-24-47.

"17. X-ray diagnosis: 'There is no evidence of bone injury, left hand; mild hypertrophic changes of bases of terminal phalanges of all the digits.'

"18. Was patient treated by anyone else?

"19. Was patient hospitalized? No.

"20. Date of admission to hospital:

"21. Is further treatment needed? Yes. For how long? 2 wks observation.

"22. Patient will be able to resume regular work on: prob. 1 week.

/s/ G. D. DELPRAT, M. D."

EXHIBIT "B"

Copy of excerpt from report of Dr. C. F. Burton, April 5, 1949:

"—Comment: This man apparently suffered a crushing type of injury to his left hand in November, 1947. Examination at that time revealed no

acute bony injury and he continued working. However, he states that there has been constant pain since that time. Examination does reveal some weakness of grip and some pain on pressure over the metacarpophalangeal joints. I feel that his complaints are considerably exaggerated and are not compatible with the injury sustained so long ago. Furthermore, it is my opinion that no pain is completely unremitting; even the severest pain of cancer will let up from time to time. For this reason I feel that his complaints of excruciating constant pain are exaggerated and to a large part functional in origin rather than organic. There is some thickening of the joint capsule, especially at the heads of the second and third metacarpals and it is quite likely that at the time of the injury there was some damage to the capsular structure which damage has persisted. Whether or not any treatment is indicated is problematical. However, from a psychosomatic point of view a course of physiotherapy will probably give him considerable relief.

"In reference to the complaints of the left leg, it is my opinion that there is no possible connection physiologically or anatomically between the injury sustained to the left hand and the complaints in the left leg. The complaints in the left leg are more than likely due to the injury sustained in February, 1949.

"/s/ C. F. BURTON, M. D."

EXHIBIT "C"

Copy of report of Dr. G. D. Delprat, Dec. 10, 1947:

"When will patient be able to work? Believed to have continued at work.

Progress of case and prognosis: To supplement our report of November 25, 1947, this is to state that patient came to our office November 25, "In office today, shown his films, given advice."

G. D. DELPRAT, M. D."

[Endorsed]: Filed May. 26, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Complaint for Injunction Pursuant to Title 33, U.S.C.A. Section 921.

Motion of Defendant, Warren H. Pillsbury, Deputy Commissioner, to Dismiss Bill of Complaint.

Notice of Appeal.

Statement of Points on Which Appellant Intends.

to Rely and Designation of Parts of the Record Necessary for the Consideration Thereof.

Deputy Commissioner's Certification of Pleadings, Transcript of Testimony, Exhibits (A, B and C,) and Decision.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 10th day of August, A.D. 1950.

C. W. CALBREATH,
Clerk.

[Seal]: /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12646. United States Court of Appeals for the Ninth Circuit. Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act, Appellant, vs. Matson Terminals, Inc., a Corporation, and Fireman's Fund Insurance Company, a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 9, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States District Court for the Northern District of California, Southern Division

No. 12646

WARREN H. PILLSBURY, Deputy Commissioner, etc.,

Appellant,

vs.

MATSON TERMINALS, INC., a Corporation,
et al.,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF PARTS OF THE RECORD NECESSARY FOR THE CONSIDERATION THEREOF

Appellant states that he intends to rely upon the following points on appeal:

1. That the District Court erred in failing to give finality to findings of fact of the deputy commissioner supported by evidence.
2. That the District Court erred in reevaluating the evidence before the deputy commissioner, and in making different fact conclusions from those found by the deputy commissioner.
3. That the District Court misconstrued the law as to when the time for filing claim for compensation begins to run.

4. That the District Court erred in denying the motion to dismiss the complaint and in setting aside the compensation order complained of.

5. Appellant designates the following parts of the Record as necessary for consideration of the above points.

1. Complaint.

2. Defendant's motion to dismiss complaint.

3. Opinion-order of the United States District Court dated May 10, 1950, and filed on May 11, 1950, and order and decree dated May 11, 1950, denying the motion of defendant to dismiss the complaint and vacating and setting aside the order of the defendant awarding compensation.

4. The transcript of testimony taken at the hearing before the deputy commissioner on January 31, 1949, together with the exhibits which were copied into said transcript at the end thereof.

5. Notice of appeal.

6. This notice.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ MACKLIN FLEMING,
Assistant U. S. Attorney.
Attorneys for Appellant.

[Endorsed]: Filed August 18, 1950.

[Title of Court of Appeals and Cause.]

**MOTION FOR CONSOLIDATION FOR
BRIEFING AND ARGUMENT**

In the above-entitled causes, appellant hereby moves for the consolidation thereof for purposes of briefing and argument in this court, the grounds for the motion being the existence of a common question of law pertinent to each of these causes, and a common opinion of the District Court covering the common point of law herein.

Dated August 28, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ MACKLIN FLEMING,
Assistant U. S. Attorney.
Attorneys for Appellant.

We join in the above motion.

Dated Aug. 28, 1950.

/s/ JOHN H. BLACK,
/s/ EDWARD R. KAY,
Attorneys for Appellees.

In the United States Court of Appeals for
the Ninth Circuit.

ORDER OF CONSOLIDATION

The above-entitled causes are hereby consolidated
for purposes of briefing and argument in this court.

Dated Aug. 28, 1950.

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ CLIFTON MATHEWS,
Circuit Judge.

/s/ WM. E. ORR,
Circuit Judge.

[Endorsed]: Filed August 30, 1950.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12646

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIR-
TEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S
AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION AND FIREMAN'S
FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

Appeal from the United States District Court for the Northern
District of California, Southern Division

PROCEEDINGS HAD IN THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

Excerpt from Proceedings of Wednesday, February 21, 1951

Before HEALY, BONE and ORR, *Circuit Judges*.

ORDER OF SUBMISSION

Ordered appeals herein argued by Mr. Reynold Colvin, Assistant
United States Attorney, counsel for appellants, and by Mr. Ed Kay,
counsel for appellees, and submitted to the court for consideration
and decision.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

Excerpt from Proceedings of Wednesday, March 14, 1951

Before HEALY, BONE and ORR, *Circuit Judges*.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING
OF JUDGMENTS

ORDERED that the typewritten opinion this day rendered by this
court in above causes be forthwith filed by the clerk, and that a
judgment be filed in each cause and recorded in the minutes of this
court in accordance with the opinion rendered.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12,644

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

No. 12,645

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

No. 12,646

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

MATSON TERMINALS, INC., A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

No. 12,647

Mar. 14, 1951

ALBERT J. CYR, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

Appeals from the United States District Court, Northern District of California, Southern Division

Before HEALY, BONE, and ORR, *Circuit Judges*.

HEALY, *Circuit Judge*.

Involved here are consolidated cases, four in number, arising under the Longshoremen's and Harbor Workers' Compensation

Act, 33 USCA §§ 901 et seq. In each case the Deputy Commissioner found a partial disability growing out of injury suffered in the course of employment. In one instance (the Shallat case) the award was for permanent and in the others for temporary disability. On appropriate proceedings before the district court the awards were annulled on the ground that the claims were barred because not filed within one year after the injury as provided in § 13(a) of the Act, 92 F. Supp. 898. The Deputy Commissioner appeals.

In each case the claimant suffered a specific injury from accident on a particular date. No latent injury or occupational disease is involved. There were no voluntary payments of compensation. The claims were filed on dates ranging from 18 to 23 months after the injury. Omitting for the moment what we regard as irrelevant or argumentative matters, the Deputy Commissioner's findings were these:

No. 12,644. Claimant Johnson on May 12, 1947, struck his head on a crossbeam of a vessel while working as a welder, "sustaining extensive strain of the muscles of the neck which still continues painful." His employer continued him in lighter work in a partially disabled condition without reduction in wages until May 15, 1948. He lost no time from work as a result of the injury until about June 15, 1948. Throughout the period in question he was furnished by his employer with medical treatment. His claim for compensation was filed January 17, 1949.

No. 12,645. Claimant Curnutt, on the 18th of February, 1947, while performing services as a sheet-metal worker in ship repair operations sustained personal injury resulting in disability as follows: While lifting a heavy object, he wrenched his back. He was disabled from work for six days, after which he was continued in lighter work at full wages until his employment was terminated January 13, 1948. He did not lose wages in excess of seven days until February 5, 1948. His claim for compensation was filed January 17, 1949. Medical treatment was furnished him by the employer throughout the period.

No. 12,646. Claimant Shallat on November 21, 1947, while performing services as a longshoreman on a vessel sustained personal injury resulting in disability as follows: He caught his left hand between a sling and a bight, causing a contusion of the left hand, and exacerbation of a pre-existing progressive arthritis of the proximal joint of the second or middle finger. Apparently he lost no time because of the injury and continued at work. It does not appear from the findings whether he received medical treatment at the expense of his employer. His claim for compensation was filed May 23, 1949.

No. 12,647. Claimant Manos on December 22, 1947, while performing services as a welder in the repair of a ship, sustained personal injury resulting in disability when he was struck on top of the head by an iron bar falling from above, suffering strain of the musculature in the cervical region. Following the injury he continued at his regular occupation as a welder without loss of time or wages until January 31, 1949, at which time, because of the condition of his neck, he was forced to discontinue working as a welder and seek other and lighter employment. Throughout the employer furnished him with medical treatment. His claim for compensation was filed August 17, 1949.

The material portion of § 13(a) of the Act reads: "The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, . . . except that if payment of compensation has been made without an award on account of such injury . . . a claim may be filed within one year after the date of the last payment . . ."

The Commissioner argues that the word "injury" should be construed as meaning "compensable injury." This, he says, has been the practical administrative construction of the term for a long time. He says that the interpretation is "consistent" with § 19(a), providing that a claim for compensation "may be filed . . . at any time after the first seven days of disability," and with § 6(a) providing that "no compensation shall be allowed for the first seven days of the disability . . ." He adds that unless the interpretation meets with judicial approval his office will be flooded with a load of unnecessary claims.

We may observe in passing that the injured men appear to have suffered a disability of greater or less extent from the outset. Two of them, at least, as the Commissioner found, had to be put on lighter work, and all of them confessedly continued from the time of injury to suffer pain and discomfort from it. It is true they lost no time; or none in excess of seven days anyway, and were paid their old wage, but those facts alone do not spell absence of disability for which an award may be made. See *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 9 Cir., 103 F. 2d 513, where this court sustained an award under like circumstances, saying that wages received by a worker who has suffered an injury are not conclusive and that ability to earn is the test.

But we do not, as the trial court did, rest decision on the *Twin Harbor* holding. What the Commissioner's argument really amounts to is that the statute begins to run, not from the date of the injury, but from the date of disability. The view appears irreconcilable with the plain terms of the Act. The argument necessarily assumes that the terms "injury" and "disability" are interchangeable. However, as we pointed out in *Kobilkin v. Pills-*

bury, 103 F. 2d 667, 669, the terms are separately defined in the statute and are not synonymous. Section 2(2) states that when used in the Act "the term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, . . ." In the same section (subdivision 10) "disability" is defined as meaning "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment."

In the *Kobilkin* case, supra, the claimant was disabled from work for a period of three weeks following his injury, for the allowable portion of which time compensation was voluntarily paid him. He then resumed his employment at the former wage and continued to work for 17 months, when his condition worsened and it was learned that his injury was more extensive than had originally been thought. Later he filed a claim. Deputy Commissioner Pillsbury disallowed it because not filed within one year from the last payment of compensation as provided in § 13(a). We upheld the ruling and the Supreme Court affirmed without opinion, 309 U.S. 619.¹ Answering an argument somewhat analogous to the one made here, we said that the injury "was inflicted at the time of the accident, not when its full extent was first noted at the later time."

The Commissioner endeavors to distinguish the holding on the ground that *Kobilkin* was off work for more than seven days in consequence of the injury and was appropriately paid compensation. If the distinction were accepted as of controlling significance a startling result would ensue, as will be seen from the following illustration: Worker A is disabled from work for eight days following his injury, and is accordingly paid compensation for the eighth day. If he fails to file a claim within a year after the payment he is forever barred. Worker B is disabled from work for but six days or less after injury, and in line with § 6(a), supra, is paid no compensation. According to the argument there is no time limit within which B may file a claim.

As the language of § 13(a) evidences, Congress was not unaware that there would be many cases like B's and it deliberately provided that the right to compensation in such cases would be

¹ The *Kobilkin* case, unlike the present, may be thought to have involved a latent or undiscovered injury. It is arguable that in such cases the injury should be treated as arising when its true nature is discovered. Possibly this circumstance accounts for the four to four division among the justices when the case was disposed of in the Supreme Court.

come barred unless claim therefor is filed within one year after the injury. If it is thought desirable in the interest of justice or practical administration that a different limitation be prescribed, the power to effect the change resides in Congress, not in the courts.

The decrees of the district court in the several cases are affirmed.

(Endorsed:) Opinion. Filed Mar. 14, 1951. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12646

WARREN H. PILLSBURY, ETC., APPELLANT

vs.

UNITED ENGINEERING COMPANY, ET AL., APPELLEES

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

(Endorsed:) Filed and entered March 14, 1951. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12646

WARREN H. PILLSBURY, ETC., APPELLANT

vs.

UNITED ENGINEERING COMPANY, ET AL., APPELLEES

Certificate of Clerk, U. S. Court of Appeals for the Ninth Circuit, To Record Certified under Rule 38 of the Revised Rules of the Supreme Court of the United States.

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing forty-eight (48) pages, numbered from and including 1 to and including 48, to

be a full, true and correct copy of the entire record of the above-entitled case in the said Court of Appeals, made pursuant to request of Hon. Philip B. Perlman, Solicitor General of the United States, counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 4th day of June, 1951. [SEAL.]

(S.) PAUL P. O'BRIEN,
Clerk.

In the Supreme Court of the United States

No. — October Term, 1951

WARREN H. PILLSBURY, DEPUTY COMMISSIONER, PETITIONER

vs.

UNITED ENGINEERING COMPANY, ET AL. (HOWARD JOHNSON,
INJURY)

WARREN H. PILLSBURY, DEPUTY COMMISSIONER, PETITIONER

vs.

UNITED ENGINEERING COMPANY, ET AL. (FRANK S. CURNETT
INJURY)

WARREN H. PILLSBURY, DEPUTY COMMISSIONER, PETITIONER

vs.

MATSON TERMINALS, INC., ET AL. (LOUIS SHALLAT INJURY)

ALBERT J. CYR, DEPUTY COMMISSIONER, PETITIONER

vs.

UNITED ENGINEERING COMPANY, ET AL. (CHRIS MANOS INJURY)

Upon consideration of the application of counsel for the petitioners,

It is ordered that the time for filing petition for certiorari in the above-entitled causes be, and the same is hereby, extended to and including 11th day of August 1951.

HUGO L. BLACK,

*Associate Justice of the Supreme
Court of the United States.*

Supreme Court of the United States

No. 229, October Term, 1951

[Title omitted.]

Order allowing certiorari

(Filed October 15, 1951)

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

VOLUME

IV

LIBRARY
SUPREME COURT, U.S.

Volume IV

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

NO. 229

WARREN H. PILLSBURY AND ALBERT A. CYE, DEPUTY
COMMISSIONERS FOR THE THIRTEENTH COMPEN-
SATION DISTRICT, ETC., PETITIONERS

VS.

UNITED ENGINEERING COMPANY, A CORPORATION
FIREMEN'S FUND INSURANCE COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 7, 1951
CERTIORARI GRANTED OCTOBER 15, 1951

INDEX

	Page
Record from U. S. D. C. for the Northern District of California, Southern Division:	
Complaint for injunction-----	2
Motion to dismiss-----	12
Opinion, Goodman, J.-----	15
Order and decree-----	22
Notice of appeal-----	23
Transcript of testimony at hearing-----	24
Testimony of Chris Manos-----	26
Exhibit "A"—Copy of excerpt from report of Dr. D. D. Lum-----	38
Exhibit "B"—Copy of report of Dr. V. C. Stehr-----	39
Exhibit "C"—Copy of report of Dr. V. C. Stehr-----	42
Exhibit "D"—Copy of report of Dr. V. C. Stehr-----	44
Exhibit "E"—Copy of report of Dr. V. C. Stehr-----	46
Clerk's certificate-----	48
Statement of points to be relied upon and designation of parts of record to be printed-----	50
Proceedings in U. S. C. A. for the Ninth Circuit:	
Motion for consolidation for briefing and argument-----	52
Order of consolidation-----	53
Order of submission-----	55
Order directing filing of opinion and filing and recording of judgments-----	55
Opinion, Healy, J.-----	56
Judgment-----	60
Clerk's certificate-----	60
Order extending time to file petition for writ of certiorari-----	63
Order allowing certiorari-----	65

No. 12647

United States
Court of Appeals
for the Ninth Circuit.

ALBERT J. CYR, Deputy Commissioner for the
Thirteenth Compensation District, Under the
Longshoremen's and Harbor Workers' Com-
pensation Act,

Appellant.

vs.

UNITED ENGINEERING COMPANY, a Cor-
poration, and **Fireman's Fund Insurance Com-**
pany, a Corporation,

Appellees.

Transcript of Record

Appeal from the United States District Court
Northern District of California,
Southern Division.

No. 1204

1884

1884

1884

1884

1884

1884

1884

1884

1884

1884

1884

1884

1884

1884

1884

1884

1884

1884

NAMES AND ADDRESSES OF ATTORNEYS

FRANK J. HENNESSY,

United States Attorney,

EDGAR R. BONSALL,

Assistant United States Attorney,

Post Office Building,

San Francisco, California,

Attorneys for

Defendant and Appellant.

JOHN H. BLACK,

EDWARD R. KAY,

233 Sansome Street,

San Francisco, California,

Attorneys for Plaintiffs and Appellees.

In the Southern Division of the United States District Court for the Northern District of California.

No. 29292-G

UNITED ENGINEERING COMPANY, a Corporation,

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Plaintiffs,

vs.

ALBERT J. CYR, Deputy Commissioner for the Thirteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act,

Defendant.

COMPLAINT FOR INJUNCTION PURSUANT
TO TITLE 33, U.S.C.A. SECTION 921

To the Honorable District Court of the United States, Northern District of California, Southern Division:

The plaintiffs, United Engineering Company, a corporation, and Fireman's Fund Insurance Company, a corporation, respectfully show:

I.

Plaintiff, United Engineering Company, at all times herein mentioned has been and now is a corporation; Plaintiff, Fireman's Fund Insurance Company, at all times herein mentioned has been

and now is a corporation. Both of said corporations have their principal offices in the City and County of San Francisco, State of California.

II.

That plaintiff Fireman's Fund Insurance Company, a corporation, at all times herein mentioned, was the Longshoremen's and Harbor Workers' Compensation insurance carrier for said United Engineering Company, a corporation.

III.

On the 22nd day of December, 1947, one Chris Manos, was in the employ of the said United Engineering Company as a longshoreman and on said date was working as such longshoreman aboard the Steamer Purisima on navigable waters of the United States at Alameda, California.

IV.

On said date and at said place and while so employed, the said Chris Manos suffered an injury to his head and neck.

V.

That thereafter on December 23, 1947, plaintiffs herein provided medical treatment to the said Chris Manos for the said injuries.

VI.

That plaintiff United Engineering Company duly filed with defendant a report covering said injuries

in accordance with Section 30 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 930.

VII.

That no compensation payments were ever made to the said Chris Manos or promised by said plaintiffs, or either of them.

VIII.

That on August 17, 1949, a claim for compensation was filed with the defendant Deputy Commissioner by the said Chris Manos alleging that the said injury of December 22, 1947, caused fibrosis, stiffness and improper function of his neck, and light-headedness and drowsiness at all times and further causing other symptoms in his head by reason of which the said Chris Manos claimed that immediately following said injury he was partially disabled.

IX.

That on August 29, 1949, a hearing was duly held before the said Deputy Commissioner at which hearing the said Chris Manos testified that because of said injury of December 22, 1947, he was only able to do light work and that he was not able to carry on his regular duties as a welder; that he continued in the employ of said United Engineering Company until approximately the end of February, 1948, following the said injury and was then laid off with a number of other men; that he was thereafter unemployed for about a week and then went to work for another employer for whom he worked for

approximately another year and was then laid off for lack of employment.

X.

On October 31, 1949, defendant made and entered a compensation order awarding compensation payments to the said Chris Manos as follows:

Federal Security Agency
Bureau of Employees' Compensation
13th Compensation District

Case No. 1366-1142—Claim No. 3281

In the Matter of
The Claim for Compensation Under the Longshore-
men's and Harbor Workers' Compensation Act.

CHRIS MANOS,

Claimant,

against

UNITED ENGINEERING COMPANY,

Employer,

FIREMAN'S FUND INSURANCE COMPANY,

Insurance Carrier.

COMPENSATION ORDER AWARD
OF COMPENSATION

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

Findings of Fact

That on the 22nd day of December, 1947, the claimant above named was in the employ of the employer above named at San Francisco harbor, in the State of California, in the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Fireman's Fund Insurance Company; that on said day claimant herein, while performing service for the employer as a welder and engaged in ship repair aboard the S.S. Purissima, which was afloat at said harbor, sustained personal injury resulting in disability when he was struck on top of the head by an iron bar falling from above and he suffered strain of the musculature in the cervical region; that written notice of the injury was not given to the employer within thirty days following said injury, but that the employer had knowledge of the injury and has not been prejudiced by lack of such written notice; that the employer furnished claimant with medical treatment, etc., in accordance with the provisions of Section 7(a) of said Act; that the claimant's average weekly wage at the time of his injury was \$62.40; that following said injury claimant herein continued at his regular occupation as a welder for the employer herein and other employers without wage loss until on or about January 31, 1949, at which time, because of the condition of his neck, he was forced to discontinue working as a

welder and seek other and lighter employment; that claimant first became disabled and suffered wage loss as a result of said injury beginning with February 1, 1949; that claim for compensation was filed on August 17, 1949, within one year from the beginning of such disability; that at the first hearing, August 29, 1949, the defendants raised the defense of period of their limitations as prescribed by said Act; that claim for compensation was filed within the one-year period prescribed by Section 13 of the said Act; that as a result of the injury sustained, claimant has a temporary partial disability beginning with February 1, 1949, which is estimated to cause a loss of wage earning capacity of \$15.60 a week, and he is entitled to compensation for such disability at the rate of \$10.40 a week; that compensation due for temporary partial disability from February 1, 1949, to the date of hearing, August 29, 1949, is 30 weeks at \$10.40 a week amounting to \$312.00; that no compensation has been paid.

Upon the foregoing facts the Deputy Commissioner makes the following:

Award

That the employer, United Engineering Company, and the insurance carrier, Fireman's Fund Insurance Company, shall pay to the claimant compensation as follows:

The sum of \$312.00 forthwith, representing compensation benefits accruing to and including August 29, 1949, and beginning with August 30, 1949, the further sum of \$10.40 a week during the continua-

tion of temporary partial disability or until the further order of the Deputy Commissioner.

Given under my hand at San Francisco, California, this 31st day of October, 1949.

ALBERT J. CYR,

Deputy Commissioner, 13th
Compensation District.

Every payment awarded under a Compensation Order earns 20% additional if not paid within 10 days from the date it becomes due.

XI.

That the evidence at the said hearing before the Deputy Commissioner is without conflict that the said Chris Manos sustained injury on the 22nd day of December, 1947, that he received medical treatment therefor, and that he suffered partial disability and symptoms as heretofore described and that no compensation payments were made or promised to the said Chris Manos by the plaintiffs, or either of them.

XII.

That no claim for compensation was filed with the Deputy Commissioner by or on behalf of the said Chris Manos until more than one year after the injury of December 22, 1947, to wit, August 17, 1949.

XIII.

That prior to the first hearing on said claim, plaintiffs pleaded that said claim was barred by the

period of limitations prescribed by the said Longshoremen's and Harbor Workers' Compensation Act.

XIV.

That by the said Compensation Order of October 31, 1949, the plaintiffs herein are ordered to pay forthwith, the sum of \$312.00 to the said Chris Manos as of August 29, 1949, and that the plaintiffs are further required to pay to the said Chris Manos the sum of \$10.40 per week from and after August 30, 1949, during the continuation of the alleged temporary partial disability or until the further order of the Deputy Commissioner.

XV.

Plaintiffs are informed and believe, and upon such information and belief, allege that the said Chris Manos, claimant in the said proceedings before the defendant Deputy Commissioner, to whom compensation payments are ordered to be paid as aforesaid, is a person of no financial means and without property, and if plaintiffs should pay to him the sums awarded in said Compensation Order, such payments could not be recovered and that accordingly plaintiffs would thereby suffer great and irreparable damage and injury if said award and order is not stayed.

XVI.

That the said claim was not filed with the Deputy Commissioner until August 17, 1949, although the

Deputy Commissioner found that claimant was entitled to temporary partial disability beginning with February 1, 1949, a period of approximately nine months, during which time said Chris Manos neglected to make any claim for compensation. The defendant's award, therefore, has placed plaintiffs in the position of being required to pay accrued compensation in the amount of \$312.00 as aforesaid, together with additional payments at the rate of \$10.40 per week from and after August 30, 1949, and indefinitely thereafter.

XVII.

Plaintiffs are informed and believe that an early date for a hearing on the merits of this matter can be had before this Honorable Court.

XVIII.

Plaintiffs believe that there is a great probability that the said Compensation Order of the defendant will be set aside by this Court on the ground that said defendant had no jurisdiction to issue such Order in view of the uncontradicted evidence that the said claim was filed more than one year after the date of said injury and that the claim is therefore barred by the limitations of time provided by the said Longshoremen's and Harbor Workers' Compensation Act.

Wherefore, plaintiffs pray that said Compensation Order and Award be set aside and the same and its enforcement be permanently enjoined and restrained; that in addition, plaintiffs pray that said Compensation Order be suspended and that

an Order be entered for an interlocutory injunction suspending the same during the pendency of this action; that payments required by said order and award, and each of them, be stayed until a final decision has been rendered herein; and it is further prayed that this Court may find and adjudge that the said claim for compensation is barred by the provisions of the Longshoremen's and Harbor Workers' Compensation Act in that it was filed more than one year after the said injury; and that plaintiffs should not be, nor is either of them subject to or liable to pay compensation for said injury to the said Chris Manos; and that said claim is not within the jurisdiction or power of defendant to administer or apply as against the plaintiffs, or either of them; and for such other and further relief as to the Court may seem just.

/s/ JOHN H. BLACK,

/s/ EDW. R. KAY,

Attorneys for Plaintiffs United Engineering Company and Fireman's Fund Insurance Co.

United States of America,
Northern District of California,
City and County of San Francisco—ss.

Geo. Jordan, being first duly sworn, deposes and says:

That he is one of the officers, to wit, Vice President of the Fireman's Fund Insurance Company, a corporation, one of the plaintiffs herein; that he has read the foregoing Complaint for Injunction

Pursuant to Title 33, U.S.C.A. Section 921, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters set forth therein upon information and belief, and as to those matters he believes it to be true.

/s/ GEO. JORDAN.

Subscribed and sworn to before me this 10th day of November, 1949.

[Seal] /s/ ROBERT C. TAYLOR, JR.,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires February 15, 1953.

[Endorsed]: Filed November 10, 1949.

[Title of District Court and Cause.]

MOTION TO DISMISS

Now comes the defendant, Albert J. Cyr, Deputy Commissioner of the United States Employees' Compensation Commission, by his attorneys, Frank J. Hennessy, United States Attorney, and Macklin Fleming, Assistant United States Attorney, for the Northern District of California, and moves this Court to dismiss the Bill of Complaint after review of the Compensation Order filed herein, for the following reasons:

(1) That the Bill of Complaint filed herein does not state a cause of action, and does not entitle plaintiff to any relief, nor does the said Bill of

Complaint state a cause of action against the defendant, Albert J. Cyr, Deputy Commissioner, upon which relief can be granted.

(2) That it appears from the Bill of Complaint including the transcripts of testimony taken before the Deputy Commissioner, the Compensation Order filed by him on the 31st day of October, 1949, complained of in the Bill of Complaint, was supported by evidence, and under the law said findings of fact should be regarded as final and conclusive.

(3) That it appears from the Bill of Complaint, including said transcripts of testimony, that said Compensation Order complained of herein is in all respects in accordance with law.

(4) For such other good and sufficient reasons as may be shown.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ MACKLIN FLEMING,
Assistant U. S. Attorney.
Attorneys for Defendant
Albert J. Cyr.

This motion will be based on the complaint and pleadings now on file in this matter and the certified copy of the transcript of the proceedings in the case before Deputy Commissioner Albert J. Cyr, which defendant intends to introduce in evidence as defendant's Exhibit A.

[Endorsed]: Filed January 13, 1950.

In the United States District Court for the Northern District of California, Southern Division

No. 29292-Civil

UNITED ENGINEERING COMPANY, a Corporation, et al.,

Plaintiff,

vs.

ALBERT J. CYR, Deputy Commissioner, etc.,
Defendant.

Appearances:

JOHN H. BLACK,
EDWARD R. KAY,

233 Sansome Street,
San Francisco, California,

Attorneys for Plaintiffs:

FRANK J. HENNESSY,

United States Attorney.

EDGAR R. BONSALE,

Assistant United States Attorney.

MACKLIN FLEMING,

Assistant United States Attorney,
San Francisco, California.

Attorneys for Defendants.

OPINION

Goodman, District Judge.

In these four consolidated actions, the plaintiff employers, and their respective insurance carriers have asked this court to set aside and enjoin the enforcement of Compensation Orders and Awards made by the Deputy Commissioner pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424; 33 USC 901-950. The question presented is whether the Deputy Commissioner lacked jurisdiction to make the awards because the claims for compensation were not filed within a year after the claimants were injured as is allegedly required by Section 13(a) of the Act. The Deputy Commissioner has moved to dismiss the complaints on the ground that the claims were timely filed and that therefore the awards were proper.

Section 13(a) of the Act provides that "The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefore is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred." (Emphasis added.)

For a proper understanding of the issues presented, a brief account of the injuries suffered by

the claimants and the events leading up to the compensation awards is here necessary.

Claimant Howard Johnson on May 12, 1947, struck his head on a cross-beam of the vessel Monterey while working as a leaderman welder. The muscles of his neck were severely strained and he was unable to continue to weld aboard ship. His employer transferred him to lighter work in the machine shop at no reduction in wages. Although his neck continued to trouble him, he continued to work regularly for more than a year until he was discharged by the new owner of the ship yards because he was unable to weld aboard ship. Since that time he has been employed only intermittently because he is physically able to perform only the less strenuous types of welding operations. When Johnson first lost time from work, he was told it was too late for him to file a claim for compensation. But when he discovered how many employment opportunities were lost because of his condition, he decided to attempt to secure compensation. On January 31, 1949, more than a year and a half after the accident, he filed his claim with the Deputy Commissioner.

Claimant Frank Curnutt on February 17, 1947, while employed as a sheetmetal worker aboard the S. S. Lurline, wrenched his back when he lifted a pre-heater from the deck to a table. He did not work for several days. When he returned to his job, he was relieved of all heavy work on doctor's orders. With some discomfort, he performed lighter duties at his former wage rate until his job ended

in about a year. After resting for two weeks to give his back a chance to heal, he obtained work with the Bethlehem Steel Company. In June of 1948, he quit work for five weeks, as a therapeutic measure suggested by his physician. In July he went to work for a sheet-metal company, but soon was forced to give up this job, and subsequent ones, because the work proved too strenuous. On January 17, 1949, nearly two years after injuring his back, Curnutt filed his claim for compensation.

Claimant Louis Shallat on November 21, 1947, while working as a stevedore aboard the S. S. Mauna Lei, caught his hands between a sling and a bight. Considerable pain and swelling in his hands resulted. According to Shallat, his left hand has pained him continuously since it was injured and he has applied self-treatment. While he testified at the hearing before the Deputy Commissioner that the injury grew "more and more severe," he also stated that "the left hand is still the same as it was when I got injured." Shallat had lost no time from work up to the date of the final hearing before the Deputy Commissioner. At that hearing, Shallat stated that he did not file his claim for compensation until May 23, 1949, nearly a year and a half after he was injured, because he thought the injury "wasn't so serious," and that "it would work its way out."

Claimant Chris Manos was welding on the deck of the tanker Purisima on December 22, 1947, when he was struck on the head by an iron saddle falling from above. He was instructed by the examining

physician not to weld thereafter and consequently was given lighter work by his employer. He suffered no reduction in rating or wages. About two months later his employment terminated as a result of a general reduction in the number of men employed at the ship yard. In a week or so he obtained a shop welding job at a slightly higher wage than he had previously received at the ship yard. This job ended in January of 1949, due to a general lay off. At the time of the hearing before Deputy Commissioner on August 29, 1949, Manos was still unemployed, but was planning to engage in sales work. Manos' neck has troubled him continually since he was struck on the head and he has received regular medical treatment. In some respects the condition of his neck apparently gradually has improved and in others it has grown worse. Manos filed a claim for compensation on August 17, 1949, more than a year and a half after he was injured.

The Deputy Commissioner justified his awards to these claimants and now grounds his motion to dismiss these complaints on his conclusion that Section 13(a) of the Compensation Act sets the one-year period of limitation running, not from the date of injury, but from the date on which the injury became compensable. There may be merit to this interpretation of Section 13(a) but these causes can be determined without reaching the question.

In my opinion, the Deputy Commissioner erred in assuming that the injuries suffered by these claimants were not compensable so long as they con-

tinued to work with no reduction in wages. It is now settled law in this Circuit that a claimant is not precluded from recovering compensation under the Act because he has been paid his old wages at all times since resuming work after being injured. *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 103 F.2d 513 (1939). Accord, *Luckenbach S. S. Co. v. Norton*, 96 F.2d 764 (3 Cir. 1938); *Hartford Accident and Indemnity Co. v. Hoage*, 85 F. 2d 420 (App. D. C. 1936). The Act says nothing about "compensable injuries" but only provides that compensation must be paid for disability. Disability is defined by Section 2(10) as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." The statute makes earning capacity the test. Earning capacity may be properly defined to mean ability to earn, rather than wages actually received. And this means ability to earn in the open labor market, not ability to secure exceptional consideration from a sympathetic employer.

Although their employers did not reduce their wages, claimants Johnson, Curnutt, and Manos were physically unable, following their injuries, to perform the same duties they had previously performed. Pain and suffering were continuous. They were well aware that unless there was improvement in their physical condition, they would be unable to again engage in strenuous activity. Claimant Manos admitted that he was told by the physician, who examined him following his injury, that he could obtain compensation. Instead of doing so, at the same physician's suggestion, he sought and ob-

tained from his employer lighter work at his former wages.

Claimant Shallat apparently continued to perform the same duties following his injury as he had before. But, if his statements to examining physicians are accepted as true, he was in constant pain. The Compensation Act does not deny relief to an injured workman until his pain exceeds endurance.

All four of the present claimants have been disabled within the meaning of the Longshoremen's and Harbor Workers' Compensation Act since the day they were injured. Consequently they had compensable claims.¹ Such claims were not timely filed. It follows that the awards of the Deputy Commissioner were not within his power to make. The court is aware of the well established rule that the Deputy Commissioner's findings of fact should not be disturbed if there is any substantial evidence to support them. But his conclusion that these claimants suffered no disability until long after they were injured is based on an error of law. The undisputed factual record shows that the earning capacity of these men was impaired from the time of injury.

The delay in the filing of these claims is wholly understandable. None of these claimants appear to have been fully aware of his rights and obligations under the Compensation Act. And, even had these men realized the consequences of delay, it is only natural that they should hesitate to jeopardize their

¹See *Liberty Mutual Insurance Co. v. Parker*, 19 F. Supp. 686 (Md. 1937) in which the same conclusion was reached on somewhat similar facts.

opportunity to continue working at their former wage rate by pressing claims for compensation. In a relatively short time the wages of these claimants would have equaled the maximum awards they could ever hope to receive. These, however, are considerations for the lawmakers and not for the Courts.

The motions to dismiss are denied and the awards are severally set aside and vacated.²

Dated May 10, 1950.

[Endorsed]: Filed May 11, 1950.

²The above order in fact fits the issues raised by the pleadings. But in order to technically comply with the rule announced by our Court of Appeals in *Twin Harbor Stevedoring & Tug Co. v. Marshall*, supra, the causes are transferred to the Admiralty docket, the motions will be treated as exceptions and are overruled and a decree will enter vacating and setting aside the awards.

In the United States District Court for the Northern District of California, Southern Division

No. 29292

UNITED ENGINEERING COMPANY, a Corporation, et al.,

Plaintiff,

vs.

ALBERT J. CYR, Deputy Commissioner, etc.,
Defendant.

ORDER AND DECREE

In the above-entitled case the motion to dismiss is denied and the award is severally set aside and vacated.

It is further ordered that the above-entitled case is transferred to the Admiralty docket, the motion will be treated as exception and is overruled and a decree is hereby entered vacating and setting aside the award.

Dated at San Francisco, California, this 11th day of May, 1950.

/s/ LOUIS E. GOODMAN,

United States District Judge.

(As amended by order of August 23, 1950.)

[Endorsed]: Filed May 11, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Albert J. Cyr, Deputy Commissioner for the Thirteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, defendant in the above-entitled action, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final order of this Court filed on May 11, 1950, denying the motion of the defendant to dismiss the complaint and vacating and setting aside the order of the defendant awarding compensation dated, October 31, 1949.

Dated: July 3, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ EDGAR R. BONSALE,
Assistant U. S. Attorney.
Attorneys for Defendant.

[Endorsed]: Filed July 3, 1950.

United States Federal Security Agency, Bureau of
Employees Compensation Before Albert J.
Cyr, Assistant Deputy Commissioner, 13th
Compensation District

Case No. 1366-1142

Claim No. 3281

August 29, 1949

CHRIS MANOS,

Claimant,

VS.

UNITED ENGINEERING CO.,

Employer,

FIREMAN'S FUND INSURANCE CO.,

Insurance Carrier.

TRANSCRIPT OF TESTIMONY
AT HEARING

Pursuant to notice, this matter was heard before
Albert J. Cyr, Assistant Deputy Commissioner,
Bureau of Employees Compensation, at the Cor-
oner's Court, at 480 Fourth Street, Oakland, Cali-
fornia, on Monday, the 29th day of August, 1949,
at 2 p.m.

Appearances:

Claimant present in person.

Defendants represented by B. W. Greenough.

Mr. Cyr: This will be a hearing on an applica-
tion filed by Chris Manos because of an injury
occurring on December 22, 1947, while he was em-

ployed as a welder by United Engineering Company.

This injury occurred on board ship on navigable waters of the United States and the case is under the jurisdiction of the Deputy Commissioner of the 13th Compensation District.

At the time of this injury the employer was insured for compensation under the Longshoremen's and Harbor Workers' Compensation Act through Fireman's Fund Insurance Company.

Medical treatment has been furnished by defendants.

No compensation has been paid.

Your claim, Mr. Manos, is that you have some partial disability because of that injury?

Mr. Manos: That is right.

Mr. Cyr: Your main trouble is in stiffness in the neck, is it?

Mr. Manos: I always have a drowsy feeling like I am falling asleep, or something, always a hanging feeling. My neck feels like cracking ice when I turn it, push it beyond a certain point.

Mr. Cyr: What is your position on this claim, Mr. Greenough? [2*]

Mr. Greenough: We raise the issues of liability for compensation and medical expense, and nature and extent of disability, and plead the claim is barred by the statute of limitation.

Mr. Cyr: With respect to the issue of statute of limitation, Mr. Greenough, the defendant's representative, informs me that that case was reported

* Page numbering appearing at bottom of page of original Reporter's Transcript.

to the Deputy Commissioner as a no time lost case on December 30, 1947, on the regular form U. S. 202. This information will be checked in our closed files, and also the record will show that Mr. Manos filed his claim for compensation benefits with the Deputy Commissioner on August 17, 1949.

CHRIS MANOS,

claimant, having been first duly sworn, testified as follows:

Mr. Cyr: Q. Your name is Chris Manos?

A. Yes.

Q. You live at 3550 Harper Avenue, Oakland, California?

A. Yes.

Q. You sustained an injury on December 22, 1947, while working for United Engineering Company?

A. Yes.

Q. And you were at the time working on a tanker?

A. Yes. [3]

Q. That was a completed tanker, you were working on ship repair on the tanker?

A. Yes.

Q. What happened to you? Tell us very briefly.

A. I was welding up on top. I had my head down and sitting on the deck. An iron saddle fell all the way down, knocked my head down as far as it could go. A couple of other workers there they knocked the iron saddle off down on my head, and it hit me on my right side and it pushed my neck further than it was supposed to go.

Q. At what time of the day was that?

(Testimony of Chris Manos.)

A. I don't exactly remember. I think it was towards evening.

Q. Did you finish the day's work?

A. I believe I went to the hospital there. I don't know whether it was on Saturday, or what, and then they took me—

Q. You say you went to the hospital there. You mean the station in the yard?

A. Yes, and the boss was right there, and then sent me to Dr. Lum and Dr. Jones, and he examined me and said I had contusions. I did not have no reflexes when he examined me, and from there within the next day or couple of days. I don't remember exactly, he sent me [4] for X-rays at Alameda Hospital. Then this crunching feeling that I had in my neck wasn't present right then. It started developing more and more as time went along. So Dr. Lum referred me to Dr. Stehr, which I am still going to Dr. Stehr still now.

Q. Did Dr. Stehr treat you, or just have you under observation?

A. Well, he stretches me and put me—I don't know what it is called—it is a silo—they lift me off the ground and stretch the neck and turn it.

Q. How often do you go to Dr. Stehr?

A. Every two weeks.

Q. You have been going to him ever since you were hurt?

A. Yes.

Q. Right after the injury of December, 1947, did you keep on working for United Engineering?

A. Dr. Lum and Dr. Jones told me not to weld,

(Testimony of Chris Manos.)

that they would put me on compensation, but if the company saw fit to give me an easy job, but not to get up on heights, to go ahead and take it because the difference would support my family, and all that, and it would be better if I could continue work. So I told the boss about it, and they did. They were pretty nice about it. They let me just line up the other fellows for work. [5]

Q. You say line up the other fellows for work, but your rating stayed as a welder?

A. That is right.

Q. The same rate of pay?

A. That is right.

Q. Then you kept on working for United Engineering? A. Yes.

Q. For how long?

A. A couple of months later.

Q. What happened a couple of months later?

A. They let more or less the whole yard off. From there I went to work for Peterson, a contractor in Hayward.

Q. Did you lose any time at all between the time you stopped working for United Engineering before you went to work for Peterson?

A. Maybe a week to get a job.

Q. What did you do for Peterson, Contractor?

A. Well, it was—you had to do everything. I mean layout, paint, weld, everything. It was a shop job.

Q. You were working as a welder?

A. Yes, welder too.

(Testimony of Chris Manos:)

Q. Did you get that job through the Union?

A. Yes, it is a union shop.

Q. As a welder? A. That is right. [6]

Q. And made the union scale wage?

A. That was a little higher. It was a shop job.

Q. A little higher than you were getting at United Engineering?

A. A little bit, a few cents.

Q. How long did you work for Peterson?

A. I worked about a year. A year, I would say. I still made my visits to Dr. Stehr. I was going once a week then.

Q. What happened after you left Peterson? What happened there? Were you terminated or did you quit?

A. They started to lay off there too, so things are pretty well closed up lately as far as work, but I will say I am falling in with another fellow to go in the selling game because I know welding is against my physical condition. I mean it does bother me, so I might as well go to selling.

Q. Have you done any work at all for wages since you left Peterson? A. No.

Q. Do you recall the date when you left Peterson? A. About six months.

Q. About six months ago?

A. About six months ago. I drew unemployment.

Q. About six months ago. That would be some time in February? [7]

A. Something like that. Well, let me see—I

(Testimony of Chris Manos.)

might have the date. It was the latter part of January.

Q. And you say you haven't worked for wages since then?

A. No, because, as I say, this fellow is going to put me in his business. He is a manufacturer and he is a good friend and he knows about the case and figures I should go selling, or something like that.

Q. I think you told me that your only trouble now is stiffness in the neck and a sort of drowsy feeling?

A. Yes, I feel drowsy all the time and sometimes it seems like I cannot get my proper step in walking, and it just clicks like crushing ice in there all the time, every move. It just crunches.

Q. You are still going to Dr. Stehr?

A. That is right.

Mr. Cyr: Mr. Greenough?

Mr. Greenough: Q. You said, Mr. Manos, that you did not notice this sensation of cracking ice in the neck at the time of your first treatment?

A. It just kept coming on.

Q. Do you remember when you first noticed it, approximately?

A. Well, the first I noticed was just clicks, just one little spot, and it started developing more and more, and now there is a real tight feeling as she comes as far [8] as I can turn it to the right or left.

(Testimony of Chris Manos.)

Q. You couldn't say when you first developed that?

A. Right along, but just come not right at first, but since it started it continued getting worse and strong.

Q. You say your neck was crushed too far when you were struck by that saddle?

A. In other words, I was sitting on my leg on the floor on the deck, and what happened, the thing hit me here and pushed me all the way down:

Mr. Cyr: Q. Pushed your head down as far as it could go, all the way?

A. Pushed my head down.

Mr. Greenough: Q. Do you remember when you first saw Dr. Stehr, approximately?

A. I went February 19, 1948.

Q. When did you say you left United, or did you state exactly?

A. They wouldn't tell me. I tried to find out, but they told me that their records are some place—Todd, or somebody has them.

Q. Was it the time Todd took over the yard or before that?

A. Before that. They told me all the records are at 500 Beale Street, San Francisco.

Q. You don't even remember the approximate date then? [9] A. When I left?

Q. Yes?

A. Approximately the end of February, 1948, I imagine, somewhere in there.

(Testimony of Chris Manos.)

Q. You were off about a week that time seeking work?

A. About a week, as close as I remember.

Q. Since the latter part of January, this year, have you tried to find work? A. Yes, I tried.

Q. You are registered for unemployment insurance?

A. Yes, that is right. I drew unemployment.

Q. When did you first come to the United Engineering Company office to inquire about compensation, or did you inquire?

A. The first I heard about it was the doctor asked me. I didn't know nothing about compensation. He asked me if anybody got in touch with me as to my case.

Q. You just answer the question if you can. Do you recall the date on which you came to the United Engineering office, approximately?

A. I went to Frisco.

Q. When?

A. It was the same day this was filed. The Matson people sent me over.

Mr. Cyr: Q. The same day you came to our office? [10] A. The same day, yes.

Q. That was the 17th day of August, 1949?

A. Yes.

Q. We took your claim that day you came in?

A. Yes.

Mr. Greenough: Q. That was the first time you made any inquiry of the company about compensation? A. That is the day.

(Testimony of Chris Manos.)

Q. You hadn't made any inquiry from the Fireman's Fund Insurance Company prior to that time?

A. No. I just went to the Matson people.

Mr. Greenough: No further questions.

Mr. Cyr: Q. You say that you left United Engineering sometime that you recall February, 1948, you were off about a week until you connected up again with Peterson, contractor? A. Yes.

Q. That week you were off work you were looking for work all along, and it took about a week to connect?

A. I don't remember exactly. I did go to Local 681 and look for work there, and at that time everybody was laying off. I don't remember the exact time but it wasn't very long, and I had to join another Union to get this other job. I joined the General Operative Engineers in order to go to work. [11]

Q. But it was not your neck kept you off work during that work, whatever it was?

A. No. I had to go to work. I had a family.

Q. You also brought out a while ago the doctor mentioned to you something about compensation or your case?

A. He just mentioned the fact if I heard anything because he told me that clinically he cannot say I am getting better, or clinically he wouldn't say I am getting worse. In other words, there isn't much he can do about it. I would have inquired before. I went on the strength of the doctor's

(Testimony of Chris Manos.)

word, that time would have healed my neck. Otherwise I would have looked into before that for something else.

Q. Just what did Dr. Stehr tell you then about your case?

A. He told me he diagnosed my case as a fibrosis, or something like that. So I asked him, well, I want to know what is the worst that could develop out of my neck, the worst, and he told me the worst that could develop on the neck would be either rheumatism or rheumatics, in that category. That is what I was concerned about, just what it could develop to.

Q. Just when did you have that conversation with Dr. Stehr, do you remember? [12]

A. He told me he wrote over, or something like that, to Frisco. That is all he said. He asked if I heard anything. I imagine he didn't know whether to send me to another doctor, or what. I said, no, I never heard anything.

Q. What did you do after that about your case?

A. Six months ago Dr. Stehr felt that the time element would be the only thing to determine whether it would get better or worse. So he asked me then once if I heard from anybody, and I didn't exactly understand what he meant anyway, and I told him, "If you can operate on my neck, go ahead and operate, clear it up," and he felt that an operation if it did clear up it might just clear it up for a short time and might come back again, so he didn't think it advisable. Then he mentioned again

(Testimony of Chris Manos.)

about the time. He wanted to send papers, I guess, for another doctor, or whatever he was going to do. I don't know. I says, "Well, do you think you could help me still by coming?" He says, "Well, it is up to you, Manos, if you want to continue coming for another six months, we will see how your neck gets in six months." So I just took it on the strength of his word. I wanted to see if time would make me feel better, but it is no better. It is worse.

Q. Am I to understand, then, it was just recently [13] or just shortly before you came in to see us you had a final conversation with Dr. Stehr about your case?

A. It is not final. I am still his patient. I am still going. I asked him what the worst could happen to my neck. I said, "Doctor, I think you should tell me that."

Q. About how many days was that before you came to our office?

A. I heard something similar to that, say, six months before I came to your office, six months where I just let it go to see what it would do. I was interested in my neck.

Q. What finally prompted you to come in to see us and see the Matson people in San Francisco?

A. I wanted to find out one way or other. I was afraid, like he went through this sort of thing, I didn't know anything about compensation laws and all that, and he told me if I went over to see the Commissioner, so when he told me that I asked

(Testimony of Chris Manos.)

the doctor about that, and I think that is how, more or less, it came about.

Q. You say you asked the doctor. That would be a few days before you finally came in to see us?

A. Six months.

Q. And after a friend of yours suggested to you to come in to see the Commissioner you waited six months. That is what I want to get straight.

A. In other words, this friend of mine said the Commissioner would contact me.

Q. How long ago was it this friend told you that?

A. Quite a while back. I don't remember exactly.

Q. A month ago?

A. No, I wouldn't know offhand, but like I say, I don't know nothing about questions. Still doesn't make no difference, just getting my neck fixed up, that is all I am worried about.

Q. (Mr. Greenough): You say now that your condition is practically the same as it was the last of January?

A. It isn't getting better. The muscles, whatever it is, are getting stiffer, tighter. The way I honestly feel, I don't feel it will ever get better.

Q. You haven't noticed much difference?

A. No, never get better.

Q. (Mr. Cyr): You haven't noticed any change since you stopped working for Peterson?

(Testimony of Chris Manos.)

A. It has changed for the worse, I would say. My neck to the right is stiffening up on me now. Whereas the first stiffness I noticed was one side, now it is also on the opposite side, getting there too. See, it is getting that side.

Q. I have one more question. What was your wage rate when you were hurt, do you remember? You put in [15] your claim \$12.50 a day. What was the hourly wage, do you remember?

A. Let me see. I don't exactly remember. The wage scale changed so often, I don't remember that. I think it was something like \$1.76, or something.

Q. But in December, 1947, you were working straight time, 40 hours a week? There was not much overtime in 1947?

A. Yes, there was overtime then. We were working quite a bit overtime at the time. We were working Saturdays and working Sundays.

Mr. Cyr: Any more questions, Mr. Greenough?

Mr. Greenough: No.

Mr. Cyr: I want to put medical reports in evidence:

Report of Dr. D. D. Lum, of December 23, 1947, as Exhibit "A";

Report of Dr. V. C. Stehr, March 9, 1948, Exhibit "B";

Another report of Dr. V. C. Stehr, of February 18, 1949, Exhibit "C";

Report of Dr. V. C. Stehr, of April 25, 1949, Exhibit "D";

Final report of Dr. V. C. Stehr, of June 27, 1949, Exhibit "E".

(Testimony of Chris Manos.)

Q. (Mr. Cyr): You are still reporting to Dr. Stehr?

A. Yes.

Q. Once a week? [16]

A. Once every two weeks.

Q. Well, you keep on doing that.

I hereby certify that the foregoing is a correct transcript of the testimony and proceedings taken in the above matter at the hearing held on the 29th day of August, 1949.

/s/ L. P. SMITH,
Reporter.

EXHIBIT "A"

Copy of excerpts from report of Dr. D. D. Lum, December 23, 1947:

"6. Date of accident: 12-22-47.

"7. State in patient's own words where and how accident occurred: Couple of workers dropped a piece of iron on patient's head.

"8. Give accurate description of nature and extent of injury and state your objective findings: No evidence of injury.

"18. Was patient treated by anyone else? No.

"19. Was patient hospitalized? No.

"21. Is further treatment needed? Yes. For how long? 2 weeks.

"22. Patient will be able to resume regular work on: No time lost.

/s/ D. D. LUM,

"MD.."

EXHIBIT "B"

Copy of report of Dr. V. C. Stehr, March 9, 1948:

"Mr. Chris Manos, a welder, employed by the United Engineering Company was living at 387 Cockman Road, San Lorenzo, California, was examined in this office on February 19, 1948.

"History: Mr. Manos stated that in November, 1947, while he was working as a welder for the United Engineering Company, he was injured when a large iron saddle was dropped a distance of about four feet striking him on his head, causing his neck to be acutely flexed in a forward direction. The patient stated that he was momentarily dazed but not rendered unconscious. He stated that he was seen at the offices of Dr. Lum and Dr. Jones of Alameda, and that X-rays were taken at the Alameda Hospital on January 19, 1948, and also on January 30, 1948. According to the patient's statement, he received heat treatments to his neck at intervals of three times a week and then this was reduced to intervals of twice a week. He does not feel that the physiotherapeutic treatments offered him afforded him any great relief. Mr. Manos stated that he has lost no time from his work but during the first two weeks following his accident he was unable to carry out his usual duties, in a normal manner.

"Past Medical History: The past medical history reveals an appendectomy to have been performed six years ago. The tonsils and adenoids

were removed as a child and he received stomach ulcer treatments while in the service.

"Present Complaints: His present complaints consist of:

1. A sensation of ice being crushed in his neck when he rotates his head to his left.
2. Occasional headaches which occur at intervals of twice a week after his working day.
3. A feeling of heaviness about the eyes as if his eyelids would close.
4. Dizziness at times.

Physical Examination: Physical examination reveals a well developed, well nourished white male of 28 years of age, 5' 10" tall and weighing about 170 pounds. He does not appear to be in any acute distress, he moves about the office easily, and is cheerful and cooperative during the examination.

The head is of normal contour, there is no remaining evidence of injury to the skin of the scalp. There is no tenderness of the underlying skull. Sensation of the skin of the scalp and face is intact. The facial muscles possess their normal innervation. The pupils are round and equal and react to light and accommodation. The extraocular muscles function in a normal manner. The nose is not deformed or obstructed. The mouth reveals the teeth to be in good state of repair. The pharynx is clear. The hearing is unimpaired in either ear. There is no muscle spasm present in the neck, slight tenderness is elicited upon deep palpation over the mid-cervical spine both on the right and left sides. Flexion and extension are complete.

Rotation of the cervical spine to the left reveals a soft grating crepitation followed by a rather sharp snap. The patient states that he does not experience any particular pain when these various sounds occur. The chest is symmetrical with good expansion that is equal bilaterally and is clear to auscultation.

The heart sounds are of good character. The abdomen is round and soft. There is a well healed scar in the lower quadrant of the abdomen indicating the site of a previous surgical intervention for an appendectomy.

The back is well muscled, there is no localized tenderness present. The motions of the back are performed in a free and painless manner. The upper and lower extremities do not reveal any pathological changes of note. Reflexes are present active, and equal bilaterally. There are no abnormal reflexes present. Sensation of the skin of the arms and legs is normal.

X-Ray Examination: X-ray films were made at the Alameda Hospital of the skull and cervical spine on January 19, 1948, and January 30, 1948, were reviewed. The X-rays of the skull do not reveal any evidence of fracture or other bone disease. There is some irregularity of bone structure involving the intra-articular facet between the fifth and sixth cervical vertebra as seen in one of the oblique films. This does not have the appearance of a recent fracture. The other views of the cervical spine fail to reveal any abnormalities.

Diagnosis: 1. Probable rupture of the ligaments about the intraarticular joints between the fifth and sixth cervical vertebra.

Comment: There is no evidence of residual intracranial injury at the time of this examination. The function of the cervical spine is within normal limits. The noise resembling crushed ice which the patient complains of in his neck could possibly be due to hypermobility at an intervertebral articulation with hypermobility at the joint involved. There is no specific treatment indicated at this time. The patient obviously can carry on his usual occupation in a satisfactory manner. It would be well to re-examine this patient after a period of about six months in order to re-evaluate his symptoms and clinical findings. It would be well at that time to determine whether any permanent disability exists.

/s/ V. C. STEHR,
M. D."

EXHIBIT "C"

Copy of report of Dr. V. C. Stehr, February 18, 1949:

"This letter is to inform you on the progress in the case of the above-named patient.

"Mr. Chris Manos visited this office again on February 12, 1949. He stated at the time of this visit that he continues to experience various complaints in relation to his neck and head. These consist of: 1) A 'funny feeling' in his neck, 2) Some stiffness on twisting his neck to the left, associated with some

limitation of motion, 3) Crepitation in the neck when the head is rotated to the left, 4) Occasional feeling of heaviness of his head.

"He states that he does not feel that there is going to be any further improvement in his condition.

"Examination at this time indicates the patient to carry his head in a relatively normal manner. The neck is in the midline. Flexion and extension are complete. Lateral tilting is free and equal bilaterally. There are about 10 degrees limitation of left rotation. Occasionally, a faint click can be heard on this motion. There is no muscle spasm noted in the neck.

"Manipulations under traction of the neck have been performed in this office at each visit that he makes. It is noted that on rotation of the neck to the left under traction that a mild click is noted, which appears to be towards the lower portion of the cervical spine on the left. When the neck is passively manipulated to the right, considerable crepitation is noted.

"This examiner is of the opinion that there has been some improvement in the condition of the neck, during the past month. This progress, of course, has been slow, but I feel, very definite. The complaints of pain have diminished and have become of the nature of unusual sensations. The marked crepitation which was originally noted has decreased considerably. It is my feeling that further time must be given for healing, and that intermittent stretching and manipulation of the neck are in order. I would suggest that after an additional period of

four to five months, a suitable settlement be attempted. I feel that the patient will probably have some persistent crepitation of a minor nature in his neck, and that he will continue to complain of discomfort in relation to the motion of the cervical spine, until a settlement has been obtained.

"/s/ V. C. STEHR,
"M. D."

EXHIBIT "D"

Copy of report of Dr. V. C. Stehr, April 25, 1949:

"This letter is furnished to acquaint you of the progress in the case of the above-named patient.

"Mr. Chris Manos was last seen in this office on April 16, 1949. There has been no appreciable change in the condition of his neck during the past several months. At times, he states, that there seems to be somewhat more stiffness present, and the crepitation continues in the usual severity.

"The examination at the time of his last visit indicates the patient to hold his neck in a rather normal position. There is about a 20 per cent limitation of rotation to the left, and slight amount of stiffness in rotation to the right. Extension is performed with some hesitancy; flexion is good. Tilting both to the right and to the left is relatively good. When the cervical spine is rotated from the midline towards the left, a mild crepitus can be heard. There does not appear to be any undue pain or discomfort associated with this crepitation.

"The treatment during the past month has consisted of manipulation of the cervical spine under head traction. This treatment has been based on the idea that the patient's disability has been primarily that of the chronic ligamentous sprain involving the articular facets of the cervical spine. I feel that it has been possible by means of this treatment to maintain the greatest amount of mobility in the neck and the degree of crepitation has been lessened to some degree.

"At the time of the patient's last visit to this office on April 18, 1949, several lateral projections of the neck were made with the neck in flexion and extension. These X-rays indicate the neck to function in a satisfactory manner. There is no indication of any subluxation of the intervertebral articulation occurring in either complete flexion or extension. There has been no calcification occurring in the anterior longitudinal ligaments or about the ligamentous structures about the intervertebral joints.

"It continues, therefore, to be my opinion that disability is primarily on the basis of scar tissue formation on the sprained ligaments of the neck. It is very difficult to estimate accurately what the final outcome of this will be. It seems very likely now after having observed him for a considerable period of time, that he will have some permanent restrictions of motion of his cervical spine, and that at intervals he may expect to have some increased discomfort which will gradually subside with the continued use of the neck in a normal manner. It would

seem, to me, to be desirable if some type of settlement can be effected during the near future.

/s/ V. C. STEHR,
M. D."

EXHIBIT "E"

Copy of report of Dr. V. C. Stehr, June 27, 1949:

"This letter is furnished you to acquaint you with the progress in the case of the above-named patient.

"Mr. Chris Manos last visited this office on June 24, 1949. He stated at the time of this visit that he has been experiencing more sensations of light head-
edness as well as associated limitation of motion of his neck. It is his feeling that there has been some deterioration of the condition of his neck during the past several weeks.

"He states that with the motion of his neck, he experiences pain and discomfort in the left side of his neck, primarily being more acute at the mid-cervical level. He is also aware of limitation of motion of the neck in extension.

"Examination at this time indicates the patient to hold the neck in a somewhat guarded manner. There is no true muscle spasm present. There is tenderness on deep palpation on the left lateral posterior portion of the neck involving almost the entire cervical spine. This is most pronounced, however, at the level of about the third and fourth cervical vertebrae. There is tenderness, but to a slightly less degree, on the right side of the neck at this level.

"Extension of the cervical spine presents about a 15 per cent limitation of motion; left rotation, about 5 per cent limitation of motion. Forward flexion and right rotation are within normal limits. Tilting of the neck to the left is slightly less free than to the right. There are no symptoms or physical findings of nerve disturbance in the upper extremities.

"The repeated X-ray studies of the cervical spine of this patient have never revealed a fracture involving the cervical vertebra. The last X-ray examination was performed in this office on April 18, 1949. These films bear the number 4401. The radiographic examination was conducted with the cervical spine in complete flexion and in as much extension as the patient could produce. This study does not show any unusual calcification of the ligaments in the neck and indicate the normal curve to be present in the position.

"Clinical examination, with the patient rotating his neck in various directions, produces an audible crepitation. This is also noted to the palpating hand during the rotation of the cervical spine.

"It has been the feeling of this office from the start that this man sustained ligamentous injuries involving the ligaments and capsules about the mid-cervical spine at the time of his injury, which is now about three years ago. Clinically, he has not demonstrated any significant increase in limited function, but the complaints of the patient have been very constant.

"Treatment has consisted of physiotherapy treat-

ments and neck stretchings with manipulations under head traction in this office. These treatments have maintained, to a very good degree, the mobility of the cervical spine with the exception of the limitations which have been noted above.

"Because it is our feeling that this man's disability is primarily on the basis of ligamentous injury with fibrous contracture, he is now being placed on a course of deep X-ray therapy with the hope of causing some shrinking of the scar tissue which, we believe, is present.

"He has been able to perform a moderate amount of work during the past year, but, at the present time, is unemployed.

"A report will be furnished you concerning his response to deep X-ray therapy.

/s/ V. C. STEHR,
M. D."

[Endorsed]: Filed September 6, 1949.

[Title of District Court and Cause.]

**CERTIFICATE OF CLERK TO RECORD
ON APPEAL**

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the appellant, to wit:

Complaint for Injunction Pursuant to Title 33,
U.S.C.A. Section 921.

Motion to Dismiss.

Notice of Appeal.

Statement of Points on Which Appellant Intends
to Rely and Designation of Parts of the Record
Necessary for the Consideration Thereof.

Defendant's Exhibit A—Deputy Commissioner's
Certification of Pleading, Transcript of Testimony,
Exhibits (A, B, C, D and E), and Decision.

In Witness Whereof, I have hereunto set my
hand and affixed the seal of said District Court this
10th day of August, A.D. 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12647. United States Court of
Appeals for the Ninth Circuit. Albert J. Cyr, Dep-
uty Commissioner for the Thirteenth Compensation
District, under the Longshoremen's and Harbor
Workers' Compensation Act, Appellant, vs. United
Engineering Company, a Corporation, and Fire-
man's Fund Insurance Company, a Corporation,
Appellees. Transcript of Record. Appeal from
the United States District Court for the Northern
District of California, Southern Division.

Filed August 9, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States District Court for the Northern District of California, Southern Division

No. 12647

ALBERT J. CYR, Deputy Commissioner, et al.,

Appellant,

vs.

UNITED ENGINEERING COMPANY, a Corporation, et al.,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF PARTS OF THE RECORD NECESSARY FOR THE CONSIDERATION THEREOF

Appellant states that he intends to rely upon the following points on appeal:

1. That the District Court erred in failing to give finality to findings of fact of the deputy commissioner supported by evidence.
2. That the District Court erred in reevaluating the evidence before the deputy commissioner, and in making different fact conclusions from those found by the deputy commissioner.
3. That the District Court misconstrued the law as to when the time for filing claim for compensation begins to run.

4. That the District Court erred in denying the motion to dismiss the complaint and in setting aside the compensation order complained of.

5. Appellant designates the following parts of the Record as necessary for consideration of the above points.

1. Complaint.

2. Defendant's motion to dismiss complaint.

3. Opinion-order of the United States District Court dated May 10, 1950, and filed on May 11, 1950, and order and decree dated May 11, 1950, denying the motion of defendant to dismiss the complaint and vacating and setting aside the order of the defendant awarding compensation.

4. The transcript of testimony taken at the hearing before the deputy commissioner on January 31, 1949, together with the exhibits which were copied into said transcript at the end thereof.

5. Notice of appeal.

6. This notice.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ MACKLIN FLEMING,
Assistant U. S. Attorney.
Attorneys for Appellant.

[Endorsed]: Filed August 18, 1950.

[Title of Court of Appeals and Cause.]

**MOTION FOR CONSOLIDATION FOR
BRIEFING AND ARGUMENT**

In the above-entitled causes, appellant hereby moves for the consolidation thereof for purposes of briefing and argument in this court, the grounds for the motion being the existence of a common question of law pertinent to each of these causes, and a common opinion of the District Court covering the common point of law herein.

Dated August 28, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ MACKLIN FLEMING,
Assistant U. S. Attorney.
Attorneys for Appellant.

We join in the above motion.

Dated Aug. 28, 1950.

/s/ JOHN H. BLACK,
/s/ EDWARD R. KAY,
Attorneys for Appellees.

In the United States Court of Appeals for
the Ninth Circuit.

ORDER OF CONSOLIDATION

The above-entitled causes are hereby consolidated
for purposes of briefing and argument in this court.

Dated Aug. 28, 1950.

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ CLIFTON MATHEWS,
Circuit Judge.

/s/ WM. E. ORR,
Circuit Judge.

[Endorsed]: Filed August 30, 1950.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12647

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIR-
TEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S
AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION AND FIREMAN'S
FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

Appeal from the United States District Court for the Northern
District of California, Southern Division

PROCEEDINGS HAD IN THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

Excerpt from Proceedings of Wednesday, February 21, 1951

Before HEALY, BONE and ORR, *Circuit Judges*.

ORDER OF SUBMISSION

Ordered appeals herein argued by Mr. Reynold Colvin, Assistant
United States Attorney, counsel for appellants, and by Mr. Ed Kay,
counsel for appellees, and submitted to the court for consideration
and decision.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

Excerpt from Proceedings of Wednesday, March 14, 1951

Before HEALY, BONE and ORR, *Circuit Judges*.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING
OF JUDGMENTS

ORDERED that the typewritten opinion this day rendered by this
court in above causes be forthwith filed by the clerk, and that a
judgment be filed in each cause and recorded in the minutes of this
court in accordance with the opinion rendered.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT.

No. 12,644

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

No. 12,645

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

No. 12,646

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

MATSON TERMINALS, INC., A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

No. 12,647

Mar. 14, 1951

ALBERT J. CYR, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLANT

vs.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLEES

Appeals from the United States District Court, Northern District of California, Southern Division

Before HEALY, BONE, and ORR, *Circuit Judges*.

HEALY, *Circuit Judge*.

Involved here are consolidated cases, four in number, arising under the Longshoremen's and Harbor Workers' Compensation

Act, 33 USCA §§ 901 et seq. In each case the Deputy Commissioner found a partial disability growing out of injury suffered in the course of employment. In one instance (the Shallat case) the award was for permanent and in the others for temporary disability. On appropriate proceedings before the district court the awards were annulled on the ground that the claims were barred because not filed within one year after the injury as provided in § 13(a) of the Act, 92 F. Supp. 898. The Deputy Commissioner appeals.

In each case the claimant suffered a specific injury from accident on a particular date. No latent injury or occupational disease is involved. There were no voluntary payments of compensation. The claims were filed on dates ranging from 18 to 23 months after the injury. Omitting for the moment what we regard as irrelevant or argumentative matters, the Deputy Commissioner's findings were these:

No. 12,644. Claimant Johnson on May 12, 1947, struck his head on a crossbeam of a vessel while working as a welder, "sustaining extensive strain of the muscles of the neck which still continues painful." His employer continued him in lighter work in a partially disabled condition without reduction in wages until May 15, 1948. He lost no time from work as a result of the injury until about June 15, 1948. Throughout the period in question he was furnished by his employer with medical treatment. His claim for compensation was filed January 17, 1949.

No. 12,645. Claimant Curnutt, on the 18th of February, 1947, while performing services as a sheet-metal worker in ship repair operations sustained personal injury resulting in disability as follows: While lifting a heavy object, he wrenched his back. He was disabled from work for six days, after which he was continued in lighter work at full wages until his employment was terminated January 13, 1948. He did not lose wages in excess of seven days until February 5, 1948. His claim for compensation was filed January 17, 1949. Medical treatment was furnished him by the employer throughout the period.

No. 12,646. Claimant Shallat on November 21, 1947, while performing services as a longshoreman on a vessel sustained personal injury resulting in disability as follows: He caught his left hand between a sling and a bight, causing a contusion of the left hand, and exacerbation of a pre-existing progressive arthritis of the proximal joint of the second or middle finger. Apparently he lost no time because of the injury and continued at work. It does not appear from the findings whether he received medical treatment at the expense of his employer. His claim for compensation was filed May, 23, 1949.

No. 12,647. Claimant Manos on December 22, 1947, while performing services as a welder in the repair of a ship, sustained personal injury resulting in disability when he was struck on top of the head by an iron bar falling from above, suffering strain of the musculature in the cervical region. Following the injury he continued at his regular occupation as a welder without loss of time or wages until January 31, 1949, at which time, because of the condition of his neck, he was forced to discontinue working as a welder and seek other and lighter employment. Throughout the employer furnished him with medical treatment. His claim for compensation was filed August 17, 1949.

The material portion of § 13(a) of the Act reads: "The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, except that if payment of compensation has been made without an award on account of such injury . . . a claim may be filed within one year after the date of the last payment . . ."

The Commissioner argues that the word "injury" should be construed as meaning "compensable injury." This, he says, has been the practical administrative construction of the term for a long time. He says that the interpretation is "consistent" with § 19(a), providing that a claim for compensation "may be filed . . . at any time after the first seven days of disability," and with § 6(a) providing that "no compensation shall be allowed for the first seven days of the disability . . ." He adds that unless the interpretation meets with judicial approval his office will be flooded with a load of unnecessary claims.

We may observe in passing that the injured men appear to have suffered a disability of greater or less extent from the outset. Two of them, at least, as the Commissioner found, had to be put on lighter work, and all of them confessedly continued from the time of injury to suffer pain and discomfort from it. It is true they lost no time, or none in excess of seven days anyway, and were paid their old wage, but those facts alone do not spell absence of disability for which an award may be made. See *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 9 Cir., 103 F. 2d 513, where this court sustained an award under like circumstances, saying that wages received by a worker who has suffered an injury are not conclusive and that ability to earn is the test.

But we do not, as the trial court did, rest decision on the *Twin Harbor* holding. What the Commissioner's argument really amounts to is that the statute begins to run, not from the date of the injury, but from the date of disability. The view appears irreconcilable with the plain terms of the Act. The argument necessarily assumes that the terms "injury" and "disability" are interchangeable. However, as we pointed out in *Kobilkin v. Pills-*

bury, 103 F. 2d 667, 669, the terms are separately defined in the statute and are not synonymous. Section 2(2) states that when used in the Act "the term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, . . ." In the same section (subdivision 10) "disability" is defined as meaning "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment."

In the *Kobilkin* case, *supra*, the claimant was disabled from work for a period of three weeks following his injury, for the allowable portion of which time compensation was voluntarily paid him. He then resumed his employment at the former wage and continued to work for 17 months, when his condition worsened and it was learned that his injury was more extensive than had originally been thought. Later he filed a claim. Deputy Commissioner Pillsbury disallowed it because not filed within one year from the last payment of compensation as provided in § 13(a). We upheld the ruling and the Supreme Court affirmed without opinion, 309 U.S. 619.¹ Answering an argument somewhat analogous to the one made here, we said that the injury "was inflicted at the time of the accident, not when its full extent was first noted at the later time."

The Commissioner endeavors to distinguish the holding on the ground that *Kobilkin* was off work for more than seven days in consequence of the injury and was appropriately paid compensation. If the distinction were accepted as of controlling significance a startling result would ensue, as will be seen from the following illustration: Worker A is disabled from work for eight days following his injury, and is accordingly paid compensation for the eighth day. If he fails to file a claim within a year after the payment he is forever barred. Worker B is disabled from work for but six days or less after injury, and in line with § 6(a); *supra*, is paid no compensation. According to the argument there is no time limit within which B may file a claim.

As the language of § 13(a) evidences, Congress was not unaware that there would be many cases like B's and it deliberately provided that the right to compensation in such cases would be-

¹ The *Kobilkin* case, unlike the present, may be thought to have involved a latent or undiscovered injury. It is arguable that in such cases the injury should be treated as arising when its true nature is discovered. Possibly this circumstance accounts for the four to four division among the justices when the case was disposed of in the Supreme Court.

come barred unless claim therefor is filed within one year after the injury. If it is thought desirable in the interest of justice or practical administration that a different limitation be prescribed, the power to effect the change resides in Congress, not in the courts.

The decrees of the district court in the several cases are affirmed.

(Endorsed:) Opinion. Filed Mar. 14, 1951. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12647

WARREN H. PILLSBURY, ETC., APPELLANT

vs.

UNITED ENGINEERING COMPANY, ET AL., APPELLEES

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

(Endorsed:) Filed and entered March 14, 1951. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 12647

WARREN H. PILLSBURY, ETC., APPELLANT

vs.

UNITED ENGINEERING COMPANY, ET AL., APPELLEES

Certificate of Clerk, U. S. Court of Appeals for the Ninth Circuit, To Record Certified under Rule 38 of the Revised Rules of the Supreme Court of the United States.

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-one (61) pages, numbered from and including 1 to and including 61 to

be a full, true and correct copy of the entire record of the above-entitled case in the said Court of Appeals, made pursuant to request of Hon. Philip B. Perlman, Solicitor General of the United States, counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit; at the City of San Francisco, in the State of California, this 4th day of June, 1951. [SEAL.]

(S.) PAUL P. O'BRIEN,
Clerk.

In the Supreme Court of the United States

No. — October Term, 1951

WARREN H. PILLSBURY, DEPUTY COMMISSIONER, PETITIONER

vs.

UNITED ENGINEERING COMPANY, ET AL. (HOWARD JOHNSON
INJURY)

WARREN H. PILLSBURY, DEPUTY COMMISSIONER, PETITIONER

vs.

UNITED ENGINEERING COMPANY, ET AL. (FRANK S. CURNETT
INJURY)

WARREN H. PILLSBURY, DEPUTY COMMISSIONER, PETITIONER

vs.

MATSON TERMINALS, INC., ET AL. (LOUIS SHALLAT INJURY)

ALBERT J. CYR, DEPUTY COMMISSIONER, PETITIONER

vs.

UNITED ENGINEERING COMPANY, ET AL. (CHRIS MANOS INJURY)

Upon consideration of the application of counsel for the petitioners,

It is ordered that the time for filing petition for certiorari in the above-entitled causes be, and the same is hereby, extended to and including 11th day of August 1951.

HUGO L. BLACK,
Associate Justice of the Supreme
Court of the United States.

Supreme Court of the United States

No. 229, October Term, 1951

[Title omitted.]

Order allowing certiorari

(Filed October 15, 1951)

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.